

260
DECLARATION OF PETITIONERS
~~EDMUND S. EHRT, ANDREW J. KEARY, AND ELLA B. KEARY~~
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 153

EDMUND S. EHRT, ANDREW J. KEARY, AND ELLA B. KEARY, PETITIONERS,

vs.
HANKS & POSTON

ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE STATE OF MICHIGAN

RECEIVED BY THE CLERK OF THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 512

EDMUND L. EBERT, ANDREW J. KEARY, AND ELLA R.
KEARY, PETITIONERS,

vs.

HARRY P. POSTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF MICHIGAN

INDEX

	Original	Print
Calendar entries.....	a	1
Caption in supreme court of Michigan.....	1	2
Record from circuit court of Wayne County.....	1	2
Bill of complaint.....	1	2
Answer	16	9
Exhibit A—Mortgage deed between E. A. Hulett et al. and A. J. Keary et al., September 25, 1916.....	29	16
Exhibit B—Sheriff's deed on mortgage sale.....	34	18
Evidence of sale and printer's bill.....	38	20
Case on appeal.....	42	22
Testimony of Andrew J. Keary.....	42	23
Dr. Harry P. Poston.....	54	30
Charles L. Bartlett.....	67	37
William W. Warren.....	70	38
Louis Cohane.....	71	39
Andrew J. Keary (recalled).....	73	40
David L. Lorimer.....	74	41

	Original	Print
Testimony of Samuel K. Slobin.....	76	42
Louis Cohane (recalled).....	77	42
Andrew J. Keary (recalled).....	78	43
Edmund L. Ebert.....	85	47
William W. Warren.....	110	61
Certificate to case on appeal.....	111	61
Opinion, Webster, J.....	112	62
Decree	117	64
Claim of appeal.....	118	65
Stipulation and order extending time.....	120	65
Plaintiff's Exhibit 1—Warranty deed, Eddie A. Hulett and Nellie E. Hulett to Harry P. Poston.....	120	65
2—Mortgage—See Defendants' Exhibit C	121	66
3—Official honorable discharge from U. S. A. of Harry P. Poston.....	121	66
4—Letter, Edmund L. Ebert to Dr. H. P. Poston	122	66
5—Certified check for \$1,735.93, H. P. Poston to Dr. H. P. Poston, endorsed to order of Andrew J. Keary and Ella R. Keary.....	123	67
6—Certified check for \$1,850, H. P. Poston to himself, endorsed by himself.....	124	67
7—Quitclaim deed, Harry P. Poston to Albert E. Catherwood.....	124	67
8—Quitclaim deed, Albert E. Catherwood to Harry P. Poston.....	125	68
9—Receipt of Detroit city treasurer's office for 1919 taxes to Harry P. Poston	125	68
10—Receipt of Detroit city treasurer's office for 1918 taxes to Harry P. Poston	125	68
11—Letter, A. J. Keary to Louis Cohane..	126	69
12—Copy of envelope addressed to Louis Cohane by A. J. Keary.....	127	69
13—Letter, Louis Cohane to Major Kerns.	128	69
14—Letter, H. N. Kerns to Louis Cohane.	129	70
Defendants' Exhibit A—Sheriff's deed on mortgage sale....	130	70
B—Receipt of city treasurer to Andrew J. Keary, showing payment of a "special assessment"	138	74
C—Mortgage, Eddie A. Hulett and Nellie E. Hulett to Andrew J. Keary and Ella R. Keary.....	139	75
D—Receipt of Wayne County treasurer's office to A. J. Keary.....	143	77
E—Statement of the military service of Harry P. Poston.....	144	77

INDEX

iii

	Original	Print
Defendants' Exhibit F—Letter from P. C. Harris, adjutant general, to Hon. Frank E. Do-remus	145	78
G—Warranty deed, Andrew J. Keary and Ella R. Keary to Edmund L. Ebert	146	78
Submission of cause.....	149	80
Opinion, Clark, J.....	151	80
Submission of motion for rehearing.....	158	85
Order denying motion for rehearing.....	159	85
Decree	160	85
Clerk's certificate.....	162	87
Supplemental return to writ of certiorari.....	163	87
Motion for rehearing and brief in support thereof.....	164	87
Affidavit of Elmer H. Groefsema.....	167	89
Affidavit of H. Charles Edwards.....	170	90
Objections and brief opposing motion for rehearing.....	174	91
Submission of motion for rehearing.....	181	94
Per curiam opinion on motion for rehearing.....	182	94
Order denying motion for rehearing.....	183	95
Order re satisfaction of decree.....	184	95
Clerk's certificate.....	185	95
Writ of certiorari and return.....	186	96



[fol. a]

CALENDAR ENTRIES

1920.

- Aug. 19. Bill of complaint filed, summons issued.
- Sept. 24. Appearance of defendants filed, entered.
- Oct. 23. Answer of defendants filed.

1921.

- Feb. 23. Motion to advance cause for trial, filed.
 - Mar. 17. Notice to produce letter filed.
 - Mar. 18. In progress; court sheet, Judge A. Webster; \$3.00 Sten.
 - Mar. 21. Heard and submitted; court sheet, Judge A. Webster.
 - Apr. 6. Notice to produce contracts, etc., and proof of service filed.
 - Oct. 12. Opinion signed, filed.
 - Oct. 22. Decree signed, filed, entered; Judge A. Webster; \$3.00; L. 16-388.
 - Oct. 22. Order, plaintiff allowed 20 days' stay of proceedings, 20 days to move for a new trial, 20 days to settle bill of exceptions, all from entry of judgment; court sheet, Judge A. Webster.
 - Oct. 29. Taxed bill of costs taxed at \$40.90 filed.
 - Nov. 10. Claim of appeal filed, \$5.00.
 - Nov. 12. Substitution of attorneys for plaintiff filed.
 - Nov. 12. Stipulation and order extending time signed, filed, entered. L. 60, p. 229.
 - Dec. 10. Motion for extension of time filed.
 - Dec. 12. Proof of service of motion filed.
- [fol. b]
- Dec. 12. Order extending time signed, filed, entered. L. 60, p. 434.
 - Dec. 12. Stenographer's certificate filed.

1922.

- Feb. 11. Stipulation and order for extension of time, etc., signed, filed and entered. L. 61, p. 553.
- Feb. 28. Stipulation and order extending time, etc., signed, filed and entered. L. 62, p. 286.
- Mar. 6. Stipulation and order extending time, etc., signed, filed, entered. L. 62, p. 338.
- Mar. 10. Stipulation and order extending time, etc., signed, filed, entered. L. 62, p. 402.
- Mar. 16. Stipulation and order extending time, etc., signed, filed, entered. L. 62, p. 472.
- Mar. 20. Motion for extension of time filed.
- Mar. 21. Proof of service of motion filed.
- Mar. 21. Order for extension of time signed, filed, entered. L. 62, p. 516.
- Apr. 6. Stipulation and order extending time signed, filed, entered. L. 63, p. 131.
- Apr. 12. Case made on appeal signed, filed.
- May 17. Return made to Supreme Court this date.

[fol. 1] STATE OF MICHIGAN:

SUPREME COURT

No. 30420

Dr. HARRY P. POSTON, Plaintiff,

v.

EDMUND L. EBERT, ANDREW J. KEARY, and ELLA R. KEARY,
Defendants.

Appeal from the Circuit Court for the County of Wayne. In
Chancery

Hon. Arthur Webster, Circuit Judge

IN CIRCUIT COURT OF WAYNE COUNTY

BILL OF COMPLAINT—Filed August 19, 1920

To the Circuit Court for the County of Wayne, In Chancery:

Your orator, Dr. Harry P. Poston, of the City of Detroit, Wayne County, Michigan, as plaintiff herein, files this as his Bill of Com-[fol. 2] plaint and thereupon he complains of Edmund L. Ebert, Andrew J. Keary and Ella R. Keary, as defendants herein, and thereupon your orator respectfully represents unto the court as follows:

1. Your orator represents that he is a resident of the City of Detroit, Wayne County, Michigan, and has been for upwards of four years last past, including therein the period of your orator's military service.

2. Your orator further says that on to-wit the sixteenth day of May, 1916, your orator purchased the property known and described as:

Lots numbered thirty-two (32), thirty-five (35), thirty-seven (37), thirty-nine (39), forty-one (41), forty-three (43), forty-five (45) and forty-seven (47) in Sunnyside subdivision of Quarter (¼) Section one (1), Ten Thousand Acre Tract, Hamtramck, according to the plat thereof recorded December 31, 1892, in Liber Eighteen (18) of Plats, on page Two (2) in the office of the Register of Deeds for Wayne County, Michigan,

said premises being situated on the east side of McDougall Avenue, between Davison and Edward Avenues, and the conveyance of said premises to your orator being recorded by record of Deeds, one dated February 20, 1917, recorded in Liber 1154, page 507 of Deeds recorded March 2, 1917, and one by record of deed dated May 16, 1917, recorded May 18, 1917, in Liber 1197 of Deeds, on page 379,

reference to which is hereby made as a part hereof, said records being contained in the office of the Register of Deeds for Wayne County, Michigan.

3. Your orator further represents unto this honorable court that the consideration for said conveyance to your orator was the sum of [fol. 3] approximately \$500.00 per lot, making the total consideration the sum of to-wit Four Thousand Dollars.

4. Your orator further represents that the conveyance to your orator was by warranty deed, so-called, but expressly made subject, however, to "a real estate mortgage in the sum of \$200 on each lot or parcel of land aforesaid, which the second party hereby assumes and agrees to pay," and your orator represents that this was the sole knowledge that your orator had with reference to any mortgage upon said premises, because of his unfamiliarity with real estate transactions and means and sources of knowledge, and that your orator believed that he might safely rely upon learning who the mortgagees were and as to the terms and conditions of the mortgage by demand from the mortgagees for the interest upon the mortgage when it should become due; and that your orator had no attorney in said transaction nor had he previously had any occasion for consultation with counsel.

5. Your orator further shows unto this court, upon information and belief, that the mortgage referred to in the preceding paragraph hereof is the one given by Eddie A. Hulett and Nellie E. Hulett, his wife, to Andrew J. Keary and Ella R. Keary, his wife, of date September 26, 1916, and recorded on September 27, 1916, in the office of the Register of Deeds for Wayne County, Michigan, in Liber 795 of Mortgages on page 506, mortgaging the premises hereinbefore stated to have been purchased by your orator among twenty lots in said mortgage mentioned as being mortgaged for a total principal [fol. 4] sum of \$4,000, which said mortgage is hereby expressly referred to as a part of this, your orator's bill of complaint.

6. Your orator further represents that he has now learned from the records of the Register of Deeds for Wayne County, Michigan, that the part of the mortgaged premises purchased by your orator purports to have been sold at mortgage sale for the total sum of \$1,756.64, by Otto G. Klanowsky, deputy sheriff, in the name of Eddie A. Hulett and Nellie E. Hulett, his wife, to the defendants Andrew J. Keary and Ella R. Keary, husband and wife, as evidenced by Sheriff's Deed of date February 5, 1918, recorded on February 7, 1918, in the office of the Register of Deeds for Wayne County, Michigan, in Liber 1932 of Deeds on page 526, as will more fully appear by reference to said recorded deed with the thereto attached notice of sale, affidavit of publication and evidence of sale hereby expressly referred to as a part of this, your orator's bill of complaint.

7. Your orator further shows unto this honorable court that said Sheriff's Deed aforesaid constitutes a cloud upon the title of your orator in and to said premises and should be removed therefrom by

this honorable court upon such terms as this court shall deem equitable; and further that your orator should have a right to redeem said premises from the mortgage upon it because said mortgage sale was defective; because your orator had a right to redeem said property and tendered redemption money therefor to the defendants herein which was wrongfully refused; because your orator tendered [fol. 5] redemption money to the Register of Deeds for the County of Wayne which was wrongfully refused; because of the fraud and deceit practiced upon your orator by the defendants herein as hereinafter set forth, and because of your orator's having been in the military service of the United States and being therefore entitled to the benefit of the provisions of the Soldiers' and Sailors' Civil Relief Act, so-called, all as hereinafter set forth.

8. Your orator further represents unto this honorable court that he entered the military service of the United States as a First Lieutenant in the Medical Corps on September 29, 1918, before he had any knowledge or information as to the claimed mortgaged foreclosure sale and months before the period of redemption would have expired had your orator known of the claimed mortgage foreclosure sale; and that at no time was demand made upon your orator for payment of said mortgage, but that on the contrary your orator was informed by the defendants herein that the defendants Keary had no intention or desire to foreclose said mortgage under the circumstances as your orator explained them of your orator's desire to enter the military service, but were perfectly willing and desirous of continuing said mortgage in effect, being satisfied with the protection afforded their principal by the mortgage and the security for interest thereon.

9. Your orator further shows that when the United States of America entered the World War, that your orator had then been in Detroit but to-wit two years and was greatly in debt by reason of two years' intensive post-graduate study as a specialist at Johns Hopkins [fol. 6] University at Baltimore, Maryland, and previous regular collegiate medical study, without earnings, and no financial resources of his own, although your orator had at the opening of the World War been married for to-wit seven years and had a child then of the age of to-wit six years. That at the opening of the World War your orator had an indebtedness of upwards of \$3,000 exclusive of the mortgage indebtedness herein. That your orator had just begun to become really established in the practice of medicine in the City of Detroit with a fine office and equipment at 1337 David Whitney Building, Detroit, and that your orator's medical practice was but just developing to where it was becoming a splendidly paying proposition as to prospects and was then worth upwards of \$5,000 a year net.

10. Your orator further shows that he is an American by birth, blood, ancestry, history and tradition dating back to when the Postons first came to this country among the very earliest settlers from Eng-

land in the year 1650. That your orator's ancestors served in the Revolutionary War, War with Mexico, Civil War; that your orator's ancestor on his mother's side, William Paca, was the first governor of the State of Maryland and served two terms and was also a signer of the Declaration of Independence and also Attorney General of the State of Maryland; and that your orator's direct ancestor, John Poston, was one of the signers of the First or Mecklenberg Declaration of Independence signed in Mecklenberg County, North Carolina by those sturdy American pioneers who in 1766 objected to the then tyrannical rule of England. That with such ancestry of Americans dating from 1650 to the present time, upon the entry of the United [fol. 7] States into the World War your orator felt the urge and call of generations of American blood sending him to his post of duty. That your orator's family responsibilities prevented him from immediately responding to the call, but that your orator immediately proceeded to make such preparations and arrangements as he could so that he might enter his country's service. That your orator secured concessions of time from certain of his creditors under the circumstances, and after a year's effort or thereabouts, was successful in so arranging his affairs by loans and otherwise that he was able to leave Mrs. Poston with a small amount of cash and through allowance and allotment provisions of the United States Government while your orator was in the service for the payment of regular monthly sums to her for the support of herself and child. That your orator's wife had always been well provided for and was accustomed to a home of comparative luxury and refinement, but had agreed to the sacrifices that would be entailed upon her and infant child by your orator entering the service and was in comparatively straitened circumstances during the time your orator was in the service and for some time thereafter and receiving the assistance of relatives.

11. Your orator further shows that on to-wit September 1, 1917, your orator for the first time learned by a notice received from the defendants herein that the mortgage hereinbefore referred to was about to become due.

12. Your orator further shows that he immediately negotiated with the defendants herein and explained the facts as to his financial situation [fol. 8] and desire to enter the military service and was advised and informed by the defendants that they had no desire or intention to foreclose the mortgage under the circumstances but were perfectly willing and desirous of continuing said mortgage in effect, being satisfied with the protection afforded their principal and interest by the mortgage. Your orator further shows unto this honorable court that he in truth and fact relied upon said representations of the defendants herein and was deceived thereby; and that said defendants thereafter and at said time were traitorously, falsely and fraudulently conspiring to cheat and deceive your orator as to their subsequent intended foreclosure of the mortgage upon said property so that your orator not being aware of the actual facts and relying

upon their representations and being deceived thereby might, if possible, lose his rights and the defendants greatly profit thereby.

13. Your orator further says that until September, 1918, your orator still maintained his office at 1337 David Whitney Building, Detroit, that being the month in which he entered the military service, and that said defendants in furtherance of their conspiracy traitorously, falsely and fraudulently to cheat and deceive your orator, as your orator believes the facts to be, deliberately refrained from notifying your orator of a mortgage sale of said premises advertised by said defendants and held on to-wit February 5, 1918, without the knowledge of your orator.

14. Your orator further says that immediately previous to leaving the City of Detroit to engage in his military service, he consulted with a friend who was also an attorney at law and an ex-soldier with reference to his financial affairs, and your orator was then advised that as to any indebtedness of your orator, the United States Government was giving full and adequate protection to him, as to all entering the military service, against being prejudiced or jeopardized by reason of being in the service, and that remedies against those in military service were abated in such cases as that of your orator during the period of war and for a period of to-wit six months thereafter. Your orator further says that he relied upon such expert information and counsel.

15. Your orator further shows and is prepared to prove to this court that following the Armistice of November 11, 1918, so-called, believing the World War to be at an end and because of his financial affairs and that of his wife and child, your orator exerted every influence to procure his prompt discharge from the military service so that he might meet his financial obligations.

16. Your orator further shows that he entered the military service on to-wit September 27, 1918, and was discharged on May 14, 1919, and after strenuous effort finally procured priority as to discharge under the ruling of the military authorities on account of being urgently needed at home to provide for his family, and because of the condition of your orator's health which was then giving way under the strain of intense application to military duties.

17. Your orator further says that he did not return to Detroit until the latter part of July, 1918, or early in August, 1918, because of the imperative requirement of rest and immediate recuperation.

[fol. 10] 18. That your orator's service consisted largely of receiving transports with casualties at the point or port of debarkation; that the wounded would be placed upon special trains for transportation from Maine to Florida and from Oregon to California and that your orator was breaking down due to the shortage of physicians, frequently twenty-four hours duty on without rest or sleep on trains in the responsible duty of being in charge of large bodies of wounded soldiers conveying them to military hospitals.

19. Your orator further shows that upon his return to Detroit his finances were at a very low ebb; his medical practice had been ruined; he had no office in which to re-open and it was impossible under then conditions in Detroit to secure one and that in order to secure means of subsistence your orator endeavored to dispose of his interest in the mortgaged premises when he for the first time learned of the mortgage foreclosure.

20. Your orator further says that he immediately communicated with the defendants herein who recognized your orator's right to redeem and admitted it and was advised by them of the amount necessary to redeem said property from said mortgage foreclosure sale, which they expressed a willingness to receive.

21. Your orator further says that he advised said defendants of his financial condition and that being unable to redeem, your orator was rather desirous of disposing of his said property. That said defendants then negotiated with your orator for an agreed price at which they would purchase said property from your orator. That said negotiations extended over a period of time. That the offer of said defendants was so niggardly that your orator was compelled to [fol. 11] refuse the same, when finally the said defendants did state to your orator that in view of the fact that your orator did not wish to sell at their price, the one alternative remained to them of requesting that your orator redeem said property from the mortgage, and the said defendants then and there fixed the sum they claimed necessary for redemption and which they stated they were willing to accept.

22. Your orator further shows that this was on to-wit November 10, 1919, and that your orator, in reliance upon the same, used his best efforts to borrow the money thus fixed by said defendants, and finally succeeded in borrowing the same and upon to-wit November 19, 1919, with additional interest from the amount previously fixed by the defendants as then again fixed by them for the later date, and that your orator then tendered to said defendants the amount thus fixed by them, when for the first time your orator was informed that said defendants did not then know whether or not your orator might still redeem, and that said defendants would take it up with their counsel, and at said mentioned to-wit November 19, 1919, said tender was refused until said defendants could consult their counsel, as they stated it.

23. Your orator further shows that subsequently the said defendants did claim that your orator had lost his right to redeem and that they would not permit or accept a redemption.

24. Your orator further charges the truth and fact to be that the said defendants were conspiring one with the other to cheat and defraud your orator out of his rights, as they believed them to be, [fol. 12] and sought deliberately to deceive him with reference thereto so that by the expiration of time, as they believed, while they prolonged their negotiations with your orator, said defendants

might make the claim, as they subsequently did, that your orator's rights had in truth and fact expired.

25. Your orator charges the truth and fact to be that the offer of said defendants to permit your orator to redeem the property at the price fixed by them was not made in good faith, but was made solely in the belief that your orator in his then financial condition but just recently returned from the military service, would not be able to raise the amount fixed by them for redemption, and was made solely in pursuance of the conspiracy of the defendants, while pretending fairness, to cheat and defraud your orator traitorously out of his rights in said property, and to take advantage of your orator's financial situation due to his military service.

26. Your orator further says that relying in good faith upon the claim of defendants then made for the first time that they wished to consult their counsel, further time elapsed until finally said defendants did claim that your orator had no rights whatsoever in said premises.

27. Your orator further shows that subsequently and on to-wit January 13, 1920, tender was made to the Register of Deeds for Wayne County, Michigan, to redeem from said mortgage, but that said tender was refused, and that your orator has continuously held himself ready, willing and able at all times to keep good his tender, to the defendants and to the Register of Deeds aforesaid.

[fol. 13] 28. Your orator further avers, as a jurisdictional averment, that the amount involved herein is upwards of the sum of \$100; and your orator further avers the truth and fact to be that at no time were the lots foreclosed by said defendants worth less than to-wit \$500 per lot; that the sale purporting to have been had by the defendants was not a fair one in which they claimed to have purchased said lots for the sum of \$220 per lot and that your orator should be protected therefrom.

Wherefore, your orator being without relief, save in a court of equity, he prays:

(a) That a summons be issued out of and under the seal of this honorable court, to said defendants directed, therein and thereby requiring and commanding them, if they can show cause why your orator should not have the relief herein prayed for, full, true, direct and perfect answer to make unto all the matters and things in this bill of complaint set forth, as fully and particularly, sentence by sentence and paragraph by paragraph, as if the same were here again repeated and they thereunto particularly interrogated.

(b) That this court find and fix the amount which the defendants in equity and justice should receive in redemption of the mortgage foreclosure sale and on account of the mortgage and that said defendants by the decree of this court be required to accept the same.

(c) That your orator have the option of paying such amount so fixed by the court unto the clerk of this court and that upon the payment thereof to him the decree of this court may be recorded by the Register of Deeds for Wayne County as a full and complete [fol. 14] discharge and satisfaction of any and all claims which the defendants may have or claim to have in said mortgaged premises.

(d) That by the decree of this court under the facts and circumstances as hereinbefore set forth and under the provisions of the Soldiers and Sailors Civil Relief Act, so-called, and under the equitable jurisdiction of this court it may be found that your orator's time for redemption had not expired when tender was made and that your orator in justice and equity is entitled to redeem from said mortgage foreclosure sale.

(e) That this court, by its decree, find that the claimed mortgage sale was not a fair one, and was therefore invalid and of no legal effect; and that the same was in other wise and manner illegal and defective.

(f) That this court, by its decree, find the said defendants guilty of fraud and deceit to the harm and detriment of your orator, so much so as to require the interposition of this honorable court as a matter of equity to right the same.

(g) That your orator may have such other, further and different relief in the premises as shall be agreeable to equity and good conscience.

And your orator will ever pray.

(Signed) H. P. Poston. Cohane & Silverstein, by (Signed)
Louis Cohane, Attorneys and of Counsel for Plaintiff.

[fol. 15] Jurat showing the foregoing was duly sworn to by H. P. Poston omitted in printing.

[fol. 16] CIRCUIT COURT FOR THE COUNTY OF WAYNE

No. 79694

DR. HARRY P. POSTON, Plaintiff,

v.

EDMUND L. EBERT, ANDREW J. KEARY, and ELLA R. KEARY,
Defendants

DEFENDANTS' ANSWER TO BILL OF COMPLAINT—Filed October 23,
1920

To the Circuit Court for the County of Wayne, in Chancery:

The joint and several answers of Edmund L. Ebert, Andrew J. Keary and Ella R. Keary, defendants in the above entitled cause to

the bill of complaint of Dr. Harry P. Poston, the above named plaintiff.

These defendants each for himself and herself and not one for the other, saving and reserving all benefit of objection and exception to said bill of complaint, for answer thereto or to so much thereof as they jointly and each of them severally are advised it is necessary to answer, say:

(1) That they neither admit nor deny the allegations contained in the first paragraph of said bill of complaint, for want of knowledge in respect thereto, and leave the plaintiff to his proof thereof.

(2) That they neither admit nor deny the allegations contained in the second paragraph of said bill of complaint, for want of knowledge in respect thereto, and leave the plaintiff to his proof thereof.

(3) That they neither admit nor deny the allegations contained in the third paragraph of said bill of complaint for want of knowledge in respect thereto, and leave the plaintiff to his proof thereof.

(4) That they neither admit nor deny the allegations contained in the fourth paragraph of said bill of complaint for want of knowledge in respect thereto, and leave the plaintiff to his proof thereof.

(5) Defendant, Edmund L. Ebert, neither admits nor denies the allegations contained in the fifth paragraph of said bill of complaint for want of knowledge regarding said allegations and leaves the plaintiff to his proof thereof, and defendants Andrew J. Keary and Ella R. Keary admit that upon the 25th day of September, 1916, the mortgage referred to in the fifth paragraph of the bill of complaint was executed and recorded as alleged in said paragraph.

(6) They neither admit nor deny that plaintiff learned from the records of the Register of Deeds for Wayne County that the mortgaged premises had been sold at a mortgage sale as set forth in said paragraph of the bill, for want of knowledge thereof and leave the plaintiff to his proof; and defendants, Andrew J. Keary and Ella R. Keary, further answering the sixth paragraph of the said bill of complaint, allege the fact to be that the mortgage given by Eddie A. Hulett and Nellie E. Hulett, his wife, to defendants Andrew J. Keary and Ella R. Keary on the 25th day of September, 1916, referred to in the fifth paragraph of the bill of complaint and covering twenty (20) lots, said mortgage being for the sum of Four Thousand (\$4,000) Dollars, was regularly and legally foreclosed under the power of sale contained in said mortgage, a copy of which is hereto annexed marked Exhibit A and made a part hereof, in accordance with the statute in such case made and provided and that in pursuance of said sale the lots referred to in paragraph two of this bill of complaint and included among the lots described in the aforesaid mortgage marked Exhibit A were purchased by defendants, Andrew J. Keary and Ella R. Keary, and a sheriff's deed was executed to them on the 5th day of February, 1918, as more fully

appears by a copy of said sheriff's deed hereto annexed and marked Exhibit B and made a part hereof.

(7) Defendants deny that said sheriff's deed, Exhibit B, constitutes only a cloud upon the title of the plaintiff in and to said premises, and jointly and severally deny that the same should be removed by this honorable court upon any terms whatsoever and further jointly and severally deny that plaintiff should be decreed to have or has a right to redeem said premises from the mortgage sale and jointly and severally deny that said mortgage sale was defective and further deny that plaintiff has any title or interest whatsoever in said lots or any of them. Defendants further jointly and severally deny that plaintiff had a right to redeem said property and [fol.19] jointly and severally deny that redemption money therefor was tendered and jointly and severally deny that the same was wrongfully refused. Defendants jointly and severally deny that plaintiff tendered redemption money to the Register of Deeds within the time allowed by statute to redeem from the mortgage foreclosure sale and deny that tender was wrongfully refused by said Register of Deeds. Defendants jointly and severally deny that the said mortgage sale was defective because of fraud and deceit practiced upon plaintiff by the defendants herein and jointly and severally deny that any fraud or deceit was practiced upon plaintiff by defendants or either of them and jointly and severally deny that said mortgage sale was defective because of plaintiff's alleged period of military service and jointly and severally deny that plaintiff is or at any time was entitled to the benefit of the provisions of the so-called soldiers' and sailors' civil relief act.

(8) Answering the eighth paragraph of said bill of complaint, defendants jointly and severally deny that plaintiff had no knowledge or information regarding the foreclosure sale months before the period of redemption expired or that no demand was made upon the plaintiff for payment of said mortgage but on the contrary avers that they, after the said mortgage became due had eight or ten telephone communications and personal conversations with the plaintiff, advising plaintiff that said mortgage was due and would be foreclosed; that plaintiff refused and neglected to pay any attention to said warning and neglected to specify a time when he would pay the said mortgage, although repeatedly asked to do so; that the [fol. 20] defendant, Edmund L. Ebert, wrote to the plaintiff urging plaintiff to pay said mortgage before publication of notice of foreclosure and these defendants jointly and severally deny that they or either of them informed plaintiff that defendants, Andrew J. Keary and Ella R. Keary had no intention or desire to foreclose said mortgage and deny that plaintiff informed the defendants or either of them of his desire to enter the military service and deny that they were willing and desirous of continuing said mortgage in effect and deny that they were satisfied with the protection afforded by said mortgage but on the contrary allege that they had no knowledge of plaintiff's intention to enter the mili-

tary service and did not know that plaintiff had been in said service until on or about the 8th day of April, A. D. 1919, and defendants Andrew J. Keary and Ella R. Keary further allege that the lands covered by said mortgage were of unsufficient and doubtful value at the time when said mortgage became due and that the security afforded to their principal by said mortgage was at said time extremely doubtful and inadequate.

(9) Defendants neither admit nor deny the allegations contained in the ninth paragraph of bill of complaint for want of knowledge and leave the plaintiff to his proof thereof.

(10) Defendants neither admit nor deny the allegations contained in the tenth paragraph of bill of complaint, for want of knowledge and leave the plaintiff to his proof thereof.

(11) Defendants neither admit nor deny the allegations contained in the eleventh paragraph of bill of complaint for want of knowledge and leave the plaintiff to his proof thereof.

[fol. 21] (12) Answering the twelfth paragraph of bill of complaint, these defendants jointly and severally deny that plaintiff immediately or at any time negotiated with the defendants or explained to them his financial situation or informed them or either of them of his desire, stimulated by the urge of his ancestry, to enter the military service, and further deny that they or either of them at any time advised or informed the plaintiff that they or either of them had no desire or intention of foreclosing the mortgage and deny that they were willing and desirous of continuing said mortgage in effect and deny that they were satisfied with the protection afforded the principal and interest by said mortgage and on the contrary allege that they had no knowledge of plaintiff's military service until on or about the 8th day of April, A. D. 1919, and further allege that these lots were vacant, of little value and afforded inadequate security for the said mortgage debt and interest. Defendants jointly and severally deny that plaintiff relied upon any representations or that he was deceived thereby and deny that they or either of them thereafter or at said time were traitorously, falsely and fraudulently intending to cheat and deceive the plaintiff as to their subsequent intended foreclosure of said mortgage or that the plaintiff was not aware of the actual facts and deny that the plaintiff relied upon any representations or that he was deceived and deny that they or either of them profited by said foreclosure sale, but on the contrary allege that they extended to plaintiff every opportunity to pay the mortgage debt and interest thereon prior to the valid foreclosure thereof and that all proceedings connected with said foreclosure sale were open, [fol. 22] fair and in the manner provided by law. That they would at the time of said foreclosure have greatly profited by redemption of said mortgage.

(13) Answering the thirteenth paragraph of the bill of complaint defendants neither admit nor deny for want of knowledge thereof that plaintiff maintained his office at 1337 David Whitney Building

until September, 1918, or that that was the month in which he entered the military service but leave the plaintiff to his proof; and these defendants jointly and severally deny that they or either of them conspired, traitorously, falsely or fraudulently to cheat and deceive the plaintiff and deny that they deliberately or in any other way refrained from notifying plaintiff of the mortgage sale, but on the contrary allege the fact to be that plaintiff was duly notified and that said sale was duly and legally published in the manner provided by law.

(14) Defendants neither admit nor deny the allegations contained in the fourteenth paragraph of said bill of complaint for want of knowledge in respect thereto and leave the plaintiff to his proof thereof.

(15) Defendants neither admit nor deny the allegations contained in the fifteenth paragraph of said bill of complaint for want of knowledge in respect thereto and leave the plaintiff to his proof thereof.

(16) Defendants neither admit nor deny the allegations contained in the sixteenth paragraph of said bill of complaint for want of knowledge thereof, and leave the plaintiff to his proof.

(17) Defendants neither admit nor deny the allegations contained [fol. 23] in the seventeenth paragraph of said bill of complaint for want of knowledge thereof, and leave the plaintiff to his proof.

(18) Defendants neither admit nor deny the allegations contained in the eighteenth paragraph of said bill of complaint for want of knowledge in respect thereto and leave the plaintiff to his proof thereof.

(19) Answering the nineteenth paragraph of the bill of complaint, defendants neither admit nor deny, for want of knowledge, that upon plaintiff's return to Detroit, his finances were at low ebb, his medical practice ruined, that he had no office in which to re-open and that it was impossible to secure one and that he endeavored to dispose of his interest in said mortgage premises, to secure the means of subsistence and as to each of said allegations they leave the plaintiff to his proof thereof. Further answering the nineteenth paragraph of the bill of complaint these defendants jointly and severally deny that he, plaintiff, upon his return to Detroit for the first time learned of the mortgage foreclosure, but on the contrary **allege the fact** to be that prior to the date upon which plaintiff alleges that he entered the military service and subsequent to the 18th day of November, A. D. 1919, he, the plaintiff, negotiated with certain persons other than defendants herein for the sale of his interest in the said mortgage premises.

(20) In answer to the twentieth paragraph of the bill of complaint defendants jointly and severally deny that they at any time after the foreclosure sale recognized plaintiff's right to redeem and deny that they admitted it and deny that they advised plaintiff of the amount [fol. 24] necessary to redeem and deny that they expressed a willing-

ness to receive said amount or any amount whatsoever, but on the contrary allege the fact to be, did, upon request of the plaintiff, inform him as to the figure at which the sale was made and all expenses connected with said sale.

(21) Answering the twenty-first paragraph of the bill of complaint defendants jointly and severally deny that plaintiff advised them or either of them of his financial condition, or of his inability to redeem, or of his desire to dispose of said property. Defendants further jointly and severally deny that they or either of them negotiated with the plaintiff for an agreed price or any price at which they would purchase said property from the plaintiff and further deny that said negotiations took place or extended over a period of time or any time. Defendants further jointly and severally deny that any offer, "niggardly" or otherwise, was made and deny that they or either of them stated to plaintiff that in view of plaintiff's unwillingness to sell at defendant's price, one alternative, namely that of redeeming said mortgage remained and further deny that they or either of them then and there or at any time fixed the sum necessary for redemption or that they stated they would accept said sum or any sum.

(22) Answering the twenty-second paragraph of the bill of complaint defendants deny that on the 10th of November, 1919, they or either of them fixed any sum at which the plaintiff might redeem or that the plaintiff relied upon any said offer and these defendants further jointly and severally deny that plaintiff on the 10th of November, 1919, or at any time tendered the defendants any amount [fol. 25] of money whatsoever and deny that on said day they first informed plaintiff that they did not know as to his rights to redeem and deny that they advised plaintiff that they would take it up with their counsel and further deny that on the 19th of November any legal tender was made by plaintiff or any person in his behalf, pending consultation with their counsel in respect to plaintiff's right to redeem or at any other time, but on the contrary allege the fact to be that on or about the 19th of November, 1919, plaintiff did tender what purported to be a check as to the amount of which defendants have no knowledge; which check defendants refused.

(23) Answering the twenty-third paragraph of the bill of complaint defendants jointly and severally deny that subsequent to the 19th of November, 1919, they first advised plaintiff that he had lost his right to redeem and that they would not permit nor accept a redemption but on the contrary allege the fact to be that plaintiff's right to redeem expired on the 7th of February, 1919, and that the defendants so advised the plaintiff.

(24) Answering the twenty-fourth paragraph of the bill of complaint defendants jointly and severally deny that they were conspiring one with the other or in any manner to cheat and defraud the plaintiff out of his rights and deny that they believed the plaintiff to have any rights in said property after the 7th day of February, 1919. Defendants further deny that they sought deliberately or in any manner to

deceive the plaintiff with reference thereto or prolonged negotiations of any character with the plaintiff, but on the contrary allege the fact to be that they at all times believed and still believe that the plaintiff's right to redeem expired on the 7th day of February, 1919, and that [fol. 26] they at no time informed the plaintiff otherwise.

(25) Answering the twenty-fifth paragraph of the bill of complaint defendants deny that any offer to permit the plaintiff to redeem was made by them or either of them and further deny that each and every transaction conducted by the defendants in respect to said mortgage foreclosure and conversations had, and acts done subsequent thereto, was not made in good faith and further deny that they had any information or belief respecting plaintiff's financial condition or his ability to raise money and deny that any amount was fixed by defendants for redemption and further deny that any acts or conversation was in pursuance of any conspiracy and further deny that any conspiracy existed and further deny that fairness to plaintiff was only pretended, to cheat and defraud the plaintiff out of his rights in said property or to take advantage of plaintiff's financial situation due to his military service, but on the contrary allege the fact to be that the plaintiff was given every opportunity to redeem from said mortgage foreclosure that the plaintiff at all times was fairly and honestly dealt with by the defendants and each of them.

(26) Answering the twenty-sixth paragraph of the bill of complaint defendants jointly and severally deny that plaintiff relied in good faith upon the claim of defendants that they wish to consult counsel thereby allowing further time to elapse so that plaintiff would have no right whatsoever in the premises, but on the contrary allege the fact to be the plaintiff was at all times subsequent to the 7th day of February, 1919, advised that his rights to redeem had expired.

[fol. 27] (27) Answering the twenty-seventh paragraph of the bill of complaint defendants neither admit nor deny the allegations contained in this paragraph of said bill of complaint for want of knowledge in respect thereto and leave the plaintiff to his proof thereof.

(28) Answering the twenty-eighth paragraph of the bill of complaint defendants admit that the amount involved herein is upwards of the sum of One Hundred Dollars (\$100.00), but deny that at the time the lots were foreclosed they were worth Five Hundred (\$500.00) Dollars per lot, but on the contrary allege the truth and fact to be that at the time of said foreclosure sale, the value of said lots was barely sufficient to cover the amount of the mortgage, interest, taxes, assessments, and cost of foreclosure and further allege the truth and fact to be that the plaintiff knew that said lots were of small value and that the Plaintiff was indifferent as to his alleged interest in said lots at the time of said foreclosure and that after the period of redemption expired these lots unexpectedly became of greater value, due to the recent real estate activity in the section of the city where these lots are situated and that after the said increase

in value the plaintiff for the first time manifested his desire to be relieved from the legal foreclosure and to be permitted to redeem therefrom and these defendants further deny that the sale of said lots was not a fair one, on the contrary allege the fact to be that said sale was fair and that the sum of Two Hundred and Twenty Dollars (\$220) per lot at the time of said sale was a fair and reasonable price for said lots and these defendants further deny that the plaintiff should be protected from said sale.

[fol. 28] And further answering said bill of complaint these defendants deny that said plaintiff is entitled to the relief, or any part thereof, therein and thereby sought, and pray that said bill may be dismissed with their costs in this behalf sustained.

(Signed) Edmund L. Ebert, Andrew J. Keary, Ella R. Keary.
Elmer H. Groefsema, Attorney for Defendants.

Jurat showing the foregoing was duly sworn to by Ella R. Keary omitted in printing.

[fol. 29] Jurat showing the foregoing was duly sworn to by Edmund L. Ebert omitted in printing.

EXHIBIT A TO ANSWER

This mortgage, made the twenty-fifth day of September in the year one thousand nine hundred and sixteen.

Witnesseth, that Eddie A. Hulett and Nellie E. Hulett, his wife, of the City of Detroit, Wayne County, Michigan, mortgagors, mortgage and warrant to Andrew J. Keary and Ella R. Keary, his wife, of the Village of New Hudson, Oakland County, Michigan, mortgagees, their heirs and assigns, the parcels of land situated in the Township of Hamtramck in the County of Wayne and State of Michigan, described as follows, to-wit: Lots (30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49) thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, and forty, forty-one, forty-[fol. 30] two, forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight and forty-nine, in Sunnyside Subdivision of part of quarter section 1,10,000 Acre Tract, Hamtramck, according to the plat thereof as recorded December 31, 1892, in liber 18, page 2 of plats, Wayne County Records.

Together with the hereditaments and appurtenances thereof, to secure the payment of the principal sum of Four Thousand (\$4,000) Dollars, payable on or before one (1) year from date hereof, and interest thereon from date at the rate of 6 per cent per annum payable semi-annually, until the full payment of said principal sum, according to the terms of a certain note bearing even date herewith, executed by Eddie A. Hulett and Nettie E. Hulett, his wife, to said mortgagees, and will pay interest at the rate of — per cent per annum, semi-annually, upon all overdue interest and principal from the time of its or their maturity.

And it is hereby expressly agreed by and between the parties hereto, as a part hereof:

1st. That said mortgagors within thirty days from the time the same become due and payable, will pay all taxes and assessments which shall be levied or placed upon the said land.

2nd. That said mortgagors will, while the mortgage debt remains unpaid, keep all buildings upon the mortgaged premises insured against loss and damage by fire, by insurers, and in amount approved by mortgagees, with the insurance money, in case of loss, made payable in the policy thereof to the mortgagees or their assigns as their mortgage interest may appear, and deliver, as issued, to the mortgagees, to be kept by them all policies of such insurance, and pay on [fol. 31] their issue, the premium for the same.

3rd. That if the mortgagors make default in the payment of any of the aforesaid taxes, or assessments, or premiums as above covenanted and agreed, said mortgagees, or holder, of the mortgage may pay the same and that the sum or sums so paid shall, from the time of their payment, be due and payable hereon as part of the mortgage debt, with interest thereon at the rate of six (6) per cent per annum.

4th. That should default be made in the payment of any installment of principal maturing hereon, before the whole thereof becomes due, or of any installment of interest when the same becomes due and payable, or of any taxes or assessments or premiums for insurance, or any part thereof, when the same are payable as above provided, and should the same or any part thereof remain unpaid for the period of thirty days, then and from thenceforth, the aforesaid principal sum, with all arrearages of interest, shall at the option of said mortgagees, their legal representatives, or assigns, become due and be payable therefrom and thereafter although the period above limited for the payment of the same shall not then have expired, anything hereinbefore, or in said note contained to the contrary thereof in any wise notwithstanding.

5th. That upon default being made in the payment of principal or interest hereon, or of any part thereof, at the time the same becomes due and payable according to the terms thereof, the said mortgagees, their legal representatives or assigns, are hereby authorized [fol. 32] and empowered to grant, bargain and sell, release and convey the said premises, property and appurtenances at public vendue and to execute and deliver to the purchaser or purchasers at such sale good and sufficient deeds of conveyance in law, pursuant to the statute in such case made and provided, rendering any surplus moneys after payment of the moneys due hereon, the attorney fee provided by law, and the costs and charges of such vendue and sale, to the said mortgagors, their heirs, legal representatives and assigns.

If not in default on the mortgage, parties of the second part agree to release any one lot upon the payment to them of Two Hundred (\$200) Dollars and interest.

In witness whereof, the said mortgagors have hereunto set their hands and seals the day and year first above written.

Eddie A. Hulett, Nellie E. Hulett. Signed, sealed and delivered in presence of: Edward E. Hill, Edmund L. Ebert.

STATE OF MICHIGAN,
County of Wayne, ss:

Before me, the subscriber, a notary public in and for said county, this 25th day of September, A. D. 1916, personally appeared Eddie A. Hulett and Nellie E. Hulett, his wife, known to me to be the persons described in, and who executed the within mortgage, and [fol. 33] severally acknowledged the execution thereof to be their free act and deed.

Edmund L. Ebert, Notary Public, Wayne County, Mich.
My commission as notary public expires on the 19th day of September, 1919.

Mortgage Tax Certificate

No. 61475

Section 3, Act No. 91, P. A. 1911

Wayne County Treasurer

STATE OF MICHIGAN,
County of Wayne, ss:

September 27, 1916.

I hereby certify that the amount secured by this mortgage is \$4,000 and that I have received \$20.00 in full for the tax thereon.

Edward F. Stein, County Treasurer of Wayne County,
Michigan.

Book 14, Page 28, Line —.

[fol. 34]

EXHIBIT B TO ANSWER

Sheriff's Deed on Mortgage Sale

This indenture, made the fifth day of February, in the year of our Lord one thousand nine hundred and eighteen, between Otto C. Klanowsky, deputy sheriff in and for the County of Wayne, in the State of Michigan, of the first part, and Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, of the second part.

Witnesseth, that whereas Eddie A. Hulett and Nellie E. Hulett,

his wife, of the City of Detroit, Wayne County, Michigan, made a certain indenture of mortgage to Andrew J. Keary and Ella R. Keary, his wife, of the Village of New Hudson, Oakland County, Michigan, dated the twenty-fifth day of September, A. D. 1916, which mortgage was duly recorded in the office of the Register of Deeds in and for the County of Wayne, State of Michigan, in liber 795 of mortgages, on page 506, on September 27, 1916, which said indenture of mortgage contained a power of sale, which has become operative by reason of a default in a condition of said mortgage.

And whereas, by virtue of said power of sale, and in pursuance of the statute in such case made and provided (no proceedings at law having been instituted to recover the debt secured by said mortgage or any part thereof), a notice was duly published that the said premises in said indenture of mortgage described or so much thereof as might be necessary to pay the amount due upon said mortgage, [fol. 35] interest, or legal costs, etc., would be sold on the fifth day of February, in the year of our Lord one thousand nine hundred and eighteen, at twelve o'clock noon, Eastern Standard time, at the southerly or Congress street entrance to the Wayne County Building in the City of Detroit, Wayne County, Michigan, that being the place of holding the Circuit Court within said county in which the premises described in said mortgage are situated.

And whereas, in pursuance of said notice, I did, on the fifth day of February, in the year last aforesaid, at twelve o'clock (Eastern Standard Time) noon of said day, expose for sale at public vendue, the lands and tenements hereinafter particularly described, and on such sale did strike off and sell the said lands and tenements to Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, for the sum of one thousand seven hundred fifty-six and 64/100 (\$1,756.64) dollars, that being the highest bid therefor and the said Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, being the highest bidders; which said lands and tenements are described as follows, viz.: Premises situated in the Township of Hamtramck, in the County of Wayne and State of Michigan, described as follows, to-wit: Lots numbered thirty-two (32), thirty-five (35), thirty-seven (37) thirty-nine (39), forty-one (41), forty-three (43), forty-five (45), and forty-seven (47), all in Sunnyside subdivision of part of quarter section 1, 10,000 acre tract, Hamtramck, according to the plat thereof as recorded December 31, 1892, in liber 18, page 2 of Plats, Wayne County Records. [fol. 36] (Said above described lots were offered for sale in separate parcels and as such were sold by me for the sums of two hundred nineteen and 58/100 (\$219.58) dollars, each respectively, aggregating in all the aforesaid sum of one thousand seven hundred fifty-six and 64/100 dollars.)

Now, this indenture witnesseth, that I, Otto C. Klanowsky, deputy sheriff aforesaid, by virtue and in pursuance of the statute in such case made and provided, and in consideration of the said sum of money so paid as aforesaid, have granted, conveyed, bargained and sold, and by this deed do grant, convey, bargain and sell unto the

said Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, their heirs and assigns, forever, all the said lands and tenements hereinbefore described, with the appurtenances, and all the estate, right, title and interest which the said mortgagors had in the said lands and tenements, and every part thereof, on the twenty-fifth day of September, in the year of our Lord one thousand nine hundred and sixteen, that being the date of said mortgage, or at any time thereafter.

To have and to hold the said lands and tenements, and every part thereof, to the said Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, their heirs and assigns, forever, to their sole and only use, benefit and behoof forever, as fully and absolutely as I, Otto C. Klanowsky, Deputy Sheriff aforesaid, under the authority aforesaid, might, could or ought to sell the same.

[fol. 37] In witness whereof, I have hereunto set my hand and seal the day and year first above written.

Otto C. Klanowsky, Deputy Sheriff in and for the County of Wayne, Michigan. Signed, sealed and delivered in presence of: Arthur Hitchens, Robert W. Webb.

STATE OF MICHIGAN,

County of Wayne, ss:

On the fifth day of February, one thousand nine hundred and eighteen, before me, a notary public in and for said county, came Otto C. Klanowsky, deputy sheriff of said county, known to me to be the person described in and who executed the above conveyance and knowledge, that he executed the same for the intents and purposes therein named.

Robert W. Webb, Notary Public, Wayne County, Mich. My commission expires June 26, 1921.

[fol. 38]

Evidence of Sale

Eddie A. Hulett et al., S. R. Smith, Attorney, 309 Majestic Building

Mortgage Foreclosure

Whereas default has been made in the condition of a certain mortgage made by Eddie A. Hulett and Nellie E. Hulett, his wife, of the City of Detroit, Wayne County, Michigan, to Andrew J. Keary and Ella T. Keary, his wife, of the Village of New Hudson, Oakland County, Michigan, dated the twenty-fifth day of September, A. D. 1916, and recorded in the office of the Register of Deeds for Wayne County, Michigan, on September 27, A. D. 1916, in liber 795 of mortgages on page 506, on which mortgage there is claimed to be due at the date of this notice the sum of one thousand six hundred sixty-one and 37/100 (\$1,661.37) dollars, principal and interest; and more than thirty days' default having been made in the pay-

ment of the principal and interest, which became due and payable on September 25, 1917; and no suit or proceeding at law or in equity having been instituted to recover the money secured by said mortgage or any part thereof, now therefore, by virtue of the power of sale contained in said mortgage and of the statute in such case made and provided, notice is hereby given that on Tuesday, the fifth day of February, A. D. 1918, at twelve o'clock, noon, Eastern Standard Time, the undersigned will at the southerly or Congress street entrance to the Wayne County Building, in the City of Detroit, Wayne County, Michigan (that being the place where the Circuit Court for the County of Wayne, Michigan, is held) sell at [fol. 39] public auction to the highest bidder, the premises described in said mortgage or so much thereof as may be necessary to pay the amount due, as aforesaid, upon said mortgage, with seven (7) per cent interest and all legal costs and charges provided in said mortgage and allowed by law, including an attorney fee, the premises situated in the Township of Hamtramck, in the County of Wayne and State of Michigan, described as follows, to-wit: lots numbered thirty-two (32), thirty-five (35), thirty-seven (37), thirty-nine (39), forty-one (41), forty-three (43), forty-five (45), and forty-seven (47), all in Sunnyside subdivision of part of quarter section 1, 10,000 acre tract, Hamtramck, according to the plat thereof as recorded December 31, 1892, in liber 18, page 2 of plats, Wayne County Records.

Dated at Detroit, Michigan, November 8th, A. D. 1917.

(Signed) Andrew J. Keary, Ella R. Keary, Mortgagees.
S. R. Smith, Attorney for Mortgagees, 309 Majestic Building, Detroit, Michigan.

STATE OF MICHIGAN,
County of Wayne, ss:

Nelson L. Korte, being duly sworn, deposes and says the annexed printed copy of a notice was taken from the Detroit Legal News, a newspaper printed and circulated in said state and county and that said notice was published in said newspaper on the 10th, 17th and 24th of November, 1st, 8th, 15th, 22nd and 29th of December, 1917, [fol. 40] 5th, 12th, 19th and 26th of January and 2nd of February, A. D. 1918, that he is the principal clerk of the printers of said newspaper, and knows well the facts stated herein.

Nelson L. Korte.

Subscribed and sworn to before me this second day of February, A. D. 1918. H. A. Wright, Notary Public in and for said County. My commission expires July 30, 1920.

Printer's Bill

5 folios 13 times.....	\$24.50
Affidavit of Publication.....	.25

\$24.75

Received Payment. Detroit Legal News, per ———

STATE OF MICHIGAN,
County of Wayne, ss:

Otto C. Klanowsky, being duly sworn, deposes and says that he is deputy sheriff of said County of Wayne, State of Michigan, that he acted as auctioneer and made the sale as described in the annexed deed pursuant to the foregoing printed notice; that the sale was opened at twelve o'clock (Eastern Standard Time) noon of the fifth day of February, A. D. 1918, at the southerly or Congress street entrance to the Wayne County Building, Detroit, Michigan, that being the place of holding the circuit court in the said County of [fol. 41] Wayne, State of Michigan, and was kept open for the space of one (1) hour, that the highest bid for said lands and tenements was the sum of one thousand seven hundred fifty-six and 64/100 dollars, made by Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, and that the sale was in all respects open and fair, and this deponent did strike off and sell the said lands and premises to the said Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, who purchased the said premises fairly, and in good faith, as deponent verily believes.

Otto C. Klanowsky.

Subscribed and sworn to before me this fifth day of February, A. D. 1918. Robert W. Webb, Notary Public, Wayne County, Mich. My commission expires June 26, 1921.

STATE OF MICHIGAN,
County of Wayne, ss:

I do hereby certify that the within mortgage deed will become operative at the expiration of one year from the fifth day of February, A. D. 1918, unless otherwise redeemed according to law in such case made and provided.

Otto C. Klanowsky, Deputy Sheriff.

[fol. 42] CIRCUIT COURT FOR COUNTY OF WAYNE

[Title omitted]

Case on Appeal

The above entitled cause came on for hearing before Hon. Arthur Webster, Wayne Circuit Judge, on Friday, the 18th day of March, 1921, Messrs. Cohane, Rhodes, Garvett & Frankel appearing as attorneys for plaintiff and Mr. Elmer H. Groefsema, with Thomas J. Bresnahan as counsel, for defendants.

The following testimony was taken and proceedings had:

KEARY, ANDREW J., being duly sworn as a witness in behalf of the plaintiff called for cross-examination under the statute, testified as follows:

Cross-examination.

By Mr. Cohane:

My full name is Andrew J. Keary, and I am one of the defendants in this case. I live in Highland Park; I have no office in the City of [fol. 43] Detroit, nor did I have one during 1917, 1918, 1919 or 1920. I am not related to Mr. Edmund L. Ebert, nor have I at any time had an office together with him. Mr. Edmund L. Ebert conducts business for me, and has been doing so for probably ten years. He invests my money for me.

Q. I will ask you whether or not Mr. Edmund L. Ebert for you invested your money in this mortgage on lots in Sunnyside Subdivision in issue or in controversy in this case?

A. He did, subject to my confirmation.

Q. Now I will ask you whether or not Mr. Ebert was authorized by you to conduct your affairs in connection with a mortgage on these lots?

A. Yes, sir.

Q. With the full understanding of your affairs, you had confidence in and had given authority to him to conduct the matter for you?

A. Well, his actions was subject to my confirmation.

Q. I will ask you whether or not you were advised from time to time in the ordinary course of your affairs, what business Mr. Ebert was transacting for you in connection with these lots on this subdivision?

A. Yes, sir.

I could not give the date from memory when I first knew that Doctor H. P. Poston was the owner of these eight lots subject to the mortgage. There was somebody came in Mr. Ebert's office and told him that he was in the service, I don't remember who it was. It might have been Mr. Warren. That was the first time I knew that the doctor was in the military service.

Q. Did you yourself personally have any dealings with Dr. Poston previous to his entering military service?

[fol. 44] A. I never saw him.

Q. I will ask you whether or not you had authorized Mr. Ebert to conduct that end of the matter for you?

A. Well, what do you refer to?

Q. Well, who was authorized to collect interest on this mortgage?

A. Mr. Ebert.

Q. Mr. Ebert collected the interest for you?

A. He was authorized.

Q. Who was authorized to secure payment of mortgages which were due you as they became due?

A. Mr. Ebert.

Q. Mr. Ebert. And he was authorized in this case to collect this money for you?

A. Yes, sir.

Q. And receipt for it?

A. Yes, sir.

Q. And to collect the interest on this mortgage and receipt for it as it became due and to take such other measures as he might deem necessary to protect your interests?

A. Any other measures that were necessary that he considered necessary, he always consulted me, subject to my consent.

I think it was I, and not Mr. Ebert who had a talk with Dr. Poston on the telephone notifying him when the mortgage became due. I could not say how long it was before the mortgage became due. I do not know the date when I first learned that the doctor was in the military service. It was the date Mr. Warren called at the office. I don't remember the date.

Q. Did you know after the doctor had returned from the military [fol. 45] service that Dr. Poston and Mr. Ebert had up the matter of this mortgage foreclosure?

A. What is the question please?

(Question read by the reporter.)

A. I knew there was talk about it, yes.

Q. I will ask you whether or not Mr. Ebert was authorized by you to conduct the negotiations with Dr. Poston for you with reference to this mortgage foreclosure?

A. Mr. Ebert negotiated and then submitted the question to me. That was the habit.

Q. I will ask you whether or not you had authorized him to negotiate for you?

A. You mean for collecting the rent or collecting—

Q. No, negotiate with reference to this mortgage foreclosure and the claim of the doctor that it could not become absolute because he was entitled to credit for the time he was in the military service, a further extension under the mortgage moratorium law?

A. I did not authorize him to do that.

Q. Did you know that he was doing it?

A. Negotiating?

Q. Negotiating with reference to it?

A. There was a good deal of talk back and forth.

Q. Did you know that he was doing that?

A. Yes, I knew it.

Q. It was with your permission and authority that he was doing so?

A. Yes, when the matter was brought up he submitted it to me.

Q. Yes, did you at any time authorize Mr. Ebert to negotiate with the doctor at a price for which he would sell these lots to you?

[fol. 46] A. I don't think so.

Q. Did you at any time—pardon me?

A. No, I didn't negotiate.

Q. Did you at any time agree that you would accept the amount of the mortgage with interest and costs at any time after May 14, 1919?

A. No, sir.

Q. Did you at any time agree with Dr. Poston that you would accept the mortgage, interest and costs and expenses to date and give a discharge of the mortgage?

A. No, sir.

Q. Did you at any time authorize Mr. Ebert to do that for you?

A. No, sir.

Q. If I understand correctly you say that you at no time ever authorized Mr. Ebert to accept the mortgage principal and interests, costs and expenses?

A. No, sir.

Q. And give a discharge of the mortgage, you at no time yourself offered to do that?

A. No time, no, sir, I did not.

Q. There is no question about your understanding exactly what I said, and that answer stands.

A. Repeat the question again please?

(Question read by the reporter.)

Q. Is that right?

A. That is correct.

Q. You want to stand by that answer?

A. Yes, sir.

I kept a book showing a record of this mortgage, and the interest and costs that I had in the matter. I recall making a computation of it on or about July 24, 1919.

[fol. 47] Q. I will ask you whether or not you recall computing the principal as of November 8, 1917, \$1,661.37?

A. I could not give you the amount from memory.

I have not that memorandum with me. I cannot remember whether or not, I computed the figures of interest to August 5th, 1919, as \$28.02, sheriff's fees \$3.00, Register of Deeds at \$2.50, tax stamp \$2.00, legal news \$24.75, attorney's fees \$35.00, as being due February 5th, 1919, \$1,756.54, interest to February 5th, 1919, \$122.96, total \$1,879.50. Interest to August 5, 1919, \$65.79. Due August 5, 1919, \$1,945.39. That is probably correct though I would not dispute them.

Q. I will ask you whether or not you recall making that computation, which you state is probably correct, for the purpose of advising the doctor that that was the amount that was due to August 5, 1919, and you were willing to accept that in order to discharge this mortgage?

A. I did not.

Q. You did not? You recall making a computation in substance like that on or about July 24, 1919?

A. I have no doubt I did. I do not recall it.

Q. As a matter of fact, didn't you make that computation for the purpose of sending it to the doctor and telling him that was the amount necessary to be paid to you in order to redeem this mortgage?

A. I made that computation to show how much I had in the

property at that time up to that date, how much I had invested in the property at that date.

Q. Didn't you send it to him in order that he might know the amount you expected him to pay before you would release him from the mortgage?

[fol. 48] A. I sent that for the purpose of telling him how much I had invested in the property.

Q. Do you recall whether or not you told him, whether or not you wrote him a letter on or about July 24, 1919?

A. I have no recollection of writing the doctor a letter.

Q. You have no recollection of sending it to him in the form of a letter?

A. No, sir. I could almost say I did not. I have no recollection.

Q. Well do you remember whether or not on or about July 24, 1919, Mr. Ebert told you that Dr. Poston wanted to pay up this mortgage and wanted you to figure up how much the amount was that he would have to pay?

A. Mr. Ebert told me—

Q. On or about July 24, 1919?

A. I don't know when it was, I would not say, some time, he told me that you, I think you were the man that asked for the amount I had invested in that property, and I gave that statement, I sent a statement to somebody, to you I presume.

Q. Do you recall whether or not with that statement you sent a letter?

A. I have no—I sent no letter that I recollect.

Q. In order to refresh your recollection, do you recall whether or not you wrote a letter and signed your name, with the computation, on or about July 24, 1919, stating that the amount due was \$1,945.39 and that you would accept that in order to release him from this mortgage?

[fol. 49] A. No, I didn't say I would accept that, I never said so. What we did say and all that was said from beginning to end was if the doctor could show he had any rights there, we would accept it, if the doctor could show he had any rights in that property we would accept it. We did not write it, however.

Q. I will ask you whether or not he did not show that to your satisfaction?

A. He did not.

Q. I ask you whether or not because of the fact he had shown it to your satisfaction, you wrote the letter?

A. I never wrote the letter.

Q. Never wrote a letter?

A. No, sir.

I wish you to understand that I at no time fixed any amount that I would accept to redeem this mortgage.

Q. I ask you whether or not you recall in November, 1919, making a computation as to how much money would be accepted by you to redeem from this mortgage?

A. I might have made the computation.

I don't remember in 1919 Mr. Ebert taking up with me an offer of Dr. Poston to pay off the amount of the mortgage debt and interest and costs in order to redeem from the mortgage debt and interest and costs in order to redeem from the mortgage, and whether or not on that basis I made a computation as to how much it was.

Q. Do you recall during a period of how many months these negotiations went on in your behalf between Dr. Poston and Mr. Ebert, with reference to these lots?

A. Well, I could not state the time.

It was several months, I don't know just how many I do not recall whether or not it was six or seven months.

[fol. 50] Q. Am I to understand you that your recollection is not very clear as to this transaction during that period?

A. Yes, you may understand that.

I was not present at the sale of these lots held on February 5th, 1918, but I had somebody present at this mortgage foreclosure sale representing me. Probably it was Mr. Edmund L. Ebert. I authorized him to buy in the property for me at that sale, I do not recall the price at which I bought it in. I do recall that I bought it in at exactly the same amount as was calculated was covered by my principal, interest, costs and expenses on account of this mortgage. I got a deed from the sheriff. It is not in my name at this time. I sold it on December 19th, 1919, to Mr. Edmund L. Ebert, one of the defendants in this case for \$325 a lot.

Q. What was the date of the mortgage foreclosure, what was the date at which you received your deed, after a year from the time of sale, February 5th, 1920?

A. I don't know when the deed was recorded.

Q. When did you get it?

A. The redemption period expired February 5, 1918.

Q. February 5, 1918?

A. Yes, it was sold on that day.

Q. Was it sold on that date?

A. No, it was sold February 5, 1918.

Q. So that the redemption period would not expire until February 5, 1919?

A. February 5, 1919.

Q. As a matter of fact, didn't you make that computation for the purpose of sending it to the doctor and telling him that was the amount necessary to be paid to you in order to redeem this mortgage?

[fol. 51] A. I made that computation to show how much I had in the property at that time up to that date, how much I had invested in the property at that date.

Q. Didn't you send it to him in order that he might know the amount you expected him to pay before you would release him from the mortgage?

A. I sent that for the purpose of telling him how much I had invested in the property.

Q. Do you recall whether or not you told him—whether or not you wrote him a letter on or about July 24, 1919?

A. I have no recollection of writing the doctor a letter.

Q. You have no recollection of sending it to him in the form of a letter?

A. No, sir. I could almost say I did not. I have no recollection. I never wrote the letter.

Q. Now, then you wish me to understand that you at no time fixed any amount that you would accept to redeem this mortgage?

A. No.

Q. I ask you whether or not you recall in November, 1919, making a computation as to how much money you would accept to redeem from this mortgage?

A. I might have made the computation.

Q. I will ask you whether or not you recall the amount that you fixed in November, 1919, to redeem from the mortgage \$1,735.93?

A. I don't remember the figures, no. If I made any I don't remember.

Q. Do you recall during a period of how many months these negotiations went on in your behalf between Dr. Poston and Mr. [fol. 52] Ebert, with reference to these lots?

A. Well, I could not state the time. It was several months, I don't know just how many.

Q. It was a number of months?

A. I would think so.

Q. Do you recall whether or not it was about 6 or 7 months?

A. No, I would not think that long.

Q. Well, 5 or 6 months?

A. Probably 2 or 3, possibly.

Q. About three months?

A. Possibly, I don't know, I would not state, I don't know, I made no record of it, I did not try to remember it.

Q. It extended over quite a period of time did it not, Mr. Keary?

A. Well, some time, I don't know how much time. I remember the mortgage foreclosure sale on February 5th, 1918. I was not there myself, but I had Mr. Ebert there, whom I authorized to buy the lots for me. I bought them in at exactly the same amount as I calculated was covered by my principal, interest, costs and expenses on account of this mortgage. I have a deed from the sheriff, but I do not own the property today as I sold it December 19th, 1919, to Mr. Edmund L. Ebert, one of the defendants in this case for \$325.00 a lot.

Q. I will ask you whether or not you have been using Mr. Ebert's office as your headquarters for the receiving of mail, and the transaction of your business?

A. I have not for the receiving of mail. I transact business there. [fol. 53] Q. How many properties does Mr. Ebert handle for you?

A. I don't know.

Q. Approximately?

A. I could not answer.

Q. At that time, approximately how many was he handling for you?

A. You mean real estate property?

Q. Yes.

A. None whatever.

Q. Outside of that mortgage, none?

A. Well, he handled mortgages but not real estate.

Q. Only that particular mortgage?

A. Oh, no, he handled other mortgages.

Q. How many?

A. I could not say, there might be possibly 50, I don't know.

Q. About 50?

A. Possibly, I would not say.

Q. About how much money would those 50 mortgages represent?

A. I could not give you any idea of the different amounts.

Q. Would it be 60 or 70 thousand dollars?

A. I don't know.

Q. This money of yours was loaned out by Ebert for you, and the mortgages were in your name?

A. Yes, sir.

Q. And the collection of interest and the handling of the mortgages, and the placing of them for you was done by Mr. Ebert?

[fol. 54] A. The placing of the mortgage? Mr. Ebert has authority to collect the interest and negotiate the loans subject to my confirmation.

Q. Has he written power of attorney from you?

A. No, sir.

Q. Are you willing at this time to accept the principal of the mortgage, together with interest, costs and expenses to this date for this property?

A. We have always been willing to accept it if the doctor could show that he had a legal right there.

The Court: I didn't understand that.

A. We have always been willing to accept if the doctor can show that he has a legal right to the property. We never refused it. Those have been my instructions to Mr. Ebert.

Q. To Mr. Ebert?

A. Yes, sir.

I have not yet recognized the doctor's legal right to redeem this mortgage, nor have I at any time before. That is all we asked, was for him to show where his rights are. I am waiting to be convinced of that. I suppose I knew at the time about the doctor's offer to Mr. Ebert in November of 1918 of \$1,753—odd dollars by a certified check. I understood he had an offer.

POSTON, DR. HARRY P., called to the stand in his own behalf, testified as follows:

Direct examination:

By Mr. Cohane:

A. My full name is Dr. Harry P. Poston, and I live in the City [fol. 55] of Detroit, and practice medicine in the City of Detroit, and my offices are at 1337 David Whitney Building. I have been practicing medicine in the City of Detroit since about December, 1916. I am a graduate of Washington University, and also of Johns Hopkins. I purchased the lots in question in May of 1917, and Exhibit 1 is a deed to me of this property from Hulett and wife subject to a real estate mortgage in the sum of \$200 on each lot or parcel of land aforesaid, which I agreed to assume and pay. It is the usual short form of printed warranty deed filled in.

(Exhibit 1 offered and received in evidence.)

I paid \$450 a lot subject to the mortgage, for the 8 lots. I subsequently sold one of them. Paper marked Exhibit 2 is the mortgage covering this property (offered and received in evidence without objections). Exhibit 3 is my certificate of discharge from the military service showing the time that I entered the service and when I was discharged.

(Exhibit 3 offered and received in evidence without objections.)

(A letter is marked Exhibit 4.)

Q. I show you a paper marked Exhibit 4 and ask you whether or not you received that through the mail?

A. Yes, sir.

Q. Exhibit 4 offered and received in evidence without objections, is a letter on the letterhead of Edmund L. Ebert, real estate broker, 308 Majestic Building, dated September 6, 1918, to Dr. H. P. Poston, Detroit, advising of the mortgage becoming due.

A. Soon after receiving this letter I telephone to Mr. Ebert and told him I was unable to pay it because I was about to enter the military service.

Q. What was his response?

[fol. 56] A. That they wanted the money.

Q. What?

A. That the interest would not do, that they wanted the money.

Q. What else, if anything, did he say?

A. That is all.

Q. He said the interest would not do, he wanted the money?

A. Yes sir.

No other payment of this mortgage was ever demanded of me, nor did I ever receive any notice of the mortgage or of the mortgage foreclosure sale, nor was I advised that the mortgage sale was to be held. Before I entered the military service I consulted with Attorney Charles L. Bartlett with reference to the mortgage.

Q. What were you told?

Mr. Bresnahan: I object to that.

The Court: How is that material?

Mr. Cohane: That is material, for the purpose of showing that he advised with and depended upon the advice of counsel as to what he supposed his rights were.

The Court: How is that binding upon the defendant?

Mr. Cohane: It is not binding except for the purpose of showing that he acted on belief as what his rights were from what his counsel stated to him, as to his rights?

The Court: I will exclude it at the present time. I do not see how it is material at all.

I left the military service May 14th, 1919. After I returned from the service I saw Mr. Ebert. I was discharged at Hoboken, and arrived at Detroit about a week later. I was on my way through to [fol. 57] Kansas City from where I returned to Detroit in the latter part of July, and had a talk with Mr. Ebert in his office. Mr. Wm. W. Warren was also present.

Q. I will ask you what the conversation was that you had with Mr. Ebert at that time?

A. We went in to see about these lots and how to get the matter settled up. Well, we began negotiations for the—he asked me what I would take for the lots, set a price on them. I said that I would have to investigate, which I did, and I set a price. I investigated the lots and found that they were worth from \$600 to \$700, information obtained locally.

Q. Then what did you do?

A. Went in to see him and he said that was very much too high, he could not consider that. He would have to talk it over with Mr. Keary, or he would talk it over with Mr. Keary and then give me an answer.

Q. Did you get an answer?

A. Eventually I got an answer. Some two or three weeks later.

Q. What answer did he give you?

A. That Mr. Keary could not consider the lots at that price, if I would have a lower figure——

Q. Where did this conversation take place with Mr. Ebert?

A. It was either on the telephone or in the office, I don't recall exactly.

Q. What conversation, tell the balance of the conversation, if any, or any other conversation?

A. I made a price then of approximately \$500 that was to be put up to Mr. Keary.

Q. Who said that was to be put up to him?

A. Mr. Ebert.

[fol. 58] Q. When next, how long later did you hear from Mr. Ebert or Keary, or did you see them?

A. Well, it was some time later——

Q. What is some time?

A. I think in about September.

Q. What answer did you get?

A. I got an answer that that was too much.

Q. What was too much?

A. The price of \$500.00.

Q. Go ahead.

A. So then later——

Q. How much later?

A. About November, some time in November I asked them what they would do, what they would offer me. They said about \$400, and for me to pay the sidewalk taxes, sewers, etc., bringing it down to approximately, say \$300 or \$325.

Q. What was your answer?

A. I told them that I would pay up the mortgage and asked them the amount.

Q. Who were you talking to then?

A. Mr. Ebert.

Q. Where was this?

A. At the time I told them I would arrange to get the money?

Q. Where did this take place?

A. In Mr. Ebert's office.

Q. What was his answer?

A. He says all right. He says we don't want the lots. We want the money.

Q. He didn't want the lots, he wanted the money?

A. Yes, sir.

[fol. 59] Q. What money?

A. The mortgage and interest. So I told him I would arrange to get it and I borrowed the money.

Q. Who did you borrow it from?

A. From Dr. George Renaud.

Q. Dr. George Renaud. How much did you borrow?

A. I think I borrowed \$1,500 from him.

Q. Did you have any other money of your own?

A. I had a little.

Exhibit 5 is my certified check for \$1,735.93.

Q. How did you arrive at the amount of that?

A. The day I went to get the certified check I called Mr. Ebert up on the telephone. He gave me the exact amount.

Q. What amount did he give you?

A. The amount stated in the check there.

Q. What did he tell you that amount was?

A. That that was the amount it would take to redeem the lots.

Q. That was the amount it would take to redeem the lots. From what?

A. From the mortgage.

Q. The one in question in this case?

A. Yes, sir.

Q. All right. After you got the certified check, what did you do?

A. I took it down. Oh, he said, you will have to bring in the army discharge, I would have to bring in the army discharge, so I got that, I took it down. They said they did not think I had any rights in the matter, the time had expired.

[fol. 60] Q. And what was it Mr. Ebert said with reference to this army discharge?

A. They wanted to see my army discharge, see when I was in the service, if I was entitled.

Q. Had any question ever been raised before that time as to whether or not you had been in the service?

A. Never.

Q. Had any question been raised before that time as to your right to redeem from the sale of these lots?

A. No.

Q. By Ebert or Keary?

A. No, sir.

Q. Had there been anything else said or done by Ebert or Keary contesting your title to these lots outside of agreeing with you on the amount that it would take to redeem it?

A. No.

After that I consulted with you and Mr. Bartlett.

Q. What further negotiations or dealings did you then have with either Ebert or Keary?

A. I don't think I had any more personally.

Exhibit 6 is the certified check dated January 13th, 1920 in the sum of \$1,850.00 which I presented to the Register of Deeds with \$200 in cash, telling him that I presented and offered that for the purpose of redeeming the lots in question in this case from the mortgage by paying the mortgage and interest, etc. I had my army papers with me at that time, and I exhibited them to him. The Register of Deeds refused this offer, and advised me to see Mr. Allen P. Cox, the Chief Assistant Prosecuting Attorney of Wayne County.

When I entered the military service, outside of these lots I had [fol. 61] a small equity in a house worth less than a thousand dollars. I owed money to Dr. Renaud, and outside of that about \$2,000 to a bank down south in the town of Bonne Terre, Mo. The Peoples Bank of Bonne Terre. I had no other financial resources of any kind. I had other obligations in the way of heavy life insurance, and wife and children. My life insurance premiums would come to \$2,000 about, annually. I was married in December, 1910, and had one child born in 1911. I had no resources for the support of my wife and child while I was in the service outside of my income from my pay in the army. I was discharged from the army May 14th, 1919.

Q. At that time did you have any resources with which to pay the mortgage on this property outside of your interest in the property itself?

A. I did not.

Q. I will ask you how much you owed at that time?

A. Well, approximately the sum that I did when I went in, a little more.

Q. How were your wife and child supported during the time you were in the service?

A. From my pay.

When I returned from the military service I could not get back into an office until September of 1919, because an office could not

be found, although I searched everywhere, then I only found an office by doubling up with another doctor in my old office at 1337 David Whitney Building. The other doctors in the suite are Dr. Herman Sanderson, Dr. Herbert Rich, Dr. Frederick Kidner, Dr. Frank Witter, Dr. Albert Catherwood, Dr. George Irvine, and myself. I doubled up with Dr. Catherwood.

[fol. 62] Q. Now Doctor, I will ask you whether or not, if you had been advised by either Ebert or Keary immediately after you returned from the military service that they would insist that their mortgage foreclosure would stand as a matter of law against any title of yours, would you have, and would you have been able to borrow the money at that time with which to pay pay them off?

A. If I had been so advised I could have.

Q. Why didn't you borrow it and pay them off?

A. Because with them I had negotiations which I expected to settle up by them buying the lots and deducting the mortgage and costs and everything.

I was born in Missouri in 1884. My people's lineage goes back in this country to 1650.

Q. What, if any connection did they have with the history of this country?

The Court: You need not go into that.

Mr. Cohane: I want to offer in evidence, your honor, all of the matters set forth and stated in paragraph ten, with reference to the family history.

The Court: How does that affect the moratorium law, how does that apply?

Mr. Cohane: Paragraph Ten, as a matter of the equities.

Mr. Cohane: I want to offer this for the purpose of showing this is just one of the kind of cases that the moratorium law was intended to protect against.

The Court: I will take an answer. We are in a Chancery proceeding.

Q. When did you first learn that this mortgage had been foreclosed?

[fol. 63] A. I was written to by Mr. Warren while in the service.

I am at this time ready and able and willing to pay both the amount due Keary and wife on the mortgage with costs and expenses on these lots, and I have been for some time.

Cross-examination.

By Mr. Groefsema:

I did not know the Hulett's prior to obtaining the title by deed from them, when I met them for the first time. This was the first venture I made in the purchase and sale of real estate in the City of Detroit. I had never been engaged in those kind of transactions before. My training was along the medical line entirely technical, entirely professional and I had no business experience.

Q. Now at the time, Doctor, that you had title to these lots, you were aware of the fact that there was a mortgage on them, were you not?

A. I was not exactly at the time, because the way I got into these things, there was a lawyer friend of mine, and a builder and myself. They were going to do the building, I put in the money to buy these lots first, that is the first seven of them or eight, they expected to build on them and sell them in a short time, that is the way I got into the venture. When I entered the military service, I was aware that the mortgage was past due.

Q. You knew also that the mortgagees wanted their money?

[fol. 64] A. I knew that they wanted it, yes because I had talked with them.

Q. You knew what would happen, or what they might do in case they were not paid?

A. Well I realized that they could, that that would happen, but I was advised that I had a certain period of time still.

Q. Now this mortgage sale took place either while you were in the City of Detroit—

A. I was here at the time, I did not know anything about it at the time. Before the mortgage became due, I received a letter from Mr. Ebert.

Q. And you had had legal advice prior to the time this mortgage sale took place, hadn't you?

A. Yes.

Q. Respecting the rights of the mortgagees to foreclose?

A. Yes, in a general way I did.

Q. At the time you acquired those lots, that is, acquired the title to them, it was vacant property?

A. It was.

Q. What were the improvements?

A. They had sidewalks I think.

Q. They had sidewalks at that time?

A. Sidewalks, but no road.

Q. Had the sidewalks been paid for?

A. I think not.

Q. Do you know who paid for them?

A. I do not.

Q. Was there any improvement—

A. I beg pardon, there were not sidewalks at that time.

[fol. 65] Q. There was no water and no sewer?

A. No water or sewer.

Q. No improvement of any kind, just a piece of vacant property on the outskirts of the city?

A. (No answer.)

Q. You bought them as I understand it for the purpose of speculation?

A. Naturally.

Q. And at the time that you entered the service, real estate in the City of Detroit depreciated considerable in value, especially vacant property?

A. Yes.

Q. Was there any other demand made in any other form?

A. No, sir, there was not.

Q. Now Doctor Poston, at the time this foreclosure mortgage sale was had, some time in 1918, these lots were worth \$200 apiece?

A. They were never worth less than \$500.

I conveyed these lots to Doctor Catherwood, my associate, by quit claim deed which was recorded, and on the same day I received back from him a quit claim deed. I own those lots now. This was done on advice of counsel in order to have this quit claim deed with the notification in it that the title was not clear of record. That was merely for the purpose of getting this question of military record and right to redeem the mortgage of record in the register of deeds.

Q. You had several conversations on the phone with Mr. Ebert to the effect, that is before you went into the service, to the effect that he wanted his money or the mortgagee wanted his money?

A. He called up several times, yes.

[fol. 66] Q. Called up several times, and told you that the interest was not enough, that he wanted the payment on the principal?

A. Yes.

Q. Was that demand for the payment insistent, doctor, that is, was it unconditional?

A. No, sir.

Q. What pay, Doctor, were you receiving while in the army?

A. \$166.00 a month and commutation. My office expenses stopped. I had to give up my lease.

Q. You testified you were paying premiums on life insurance policies, and the premiums amounted to \$2,000.00, Doctor, is that right?

A. Between \$1,500 and \$2,000, it was.

Q. How long had these life insurance policies been running?

A. Over a period of ten or twelve years.

Q. Were those endowment or straight life or what kind, Doctor, generally speaking?

A. Endowment, 20-payment, ordinary life, and term.

Q. What was the cash surrender value at the time you returned from service, Doctor, of all those insurance policies?

A. I don't know, because I had borrowed on them.

Q. You had already borrowed on them?

A. Yes, sir.

A. Yes, sir. I borrowed on them before I went into service to buy those lots.

[fol. 67] Redirect examination.

By Mr. Cohane:

I practiced medicine in Detroit for 22 months prior to entering the service. I had graduated in 1907, and took a post graduate course

in a hospital for several years as a physician. Paper marked Exhibit 7 is a quit claim deed from myself to Doctor Catherwood, and Exhibit 8 is a quit claim deed back to me from the Doctor. Exhibits 7 and 8 offered and received in evidence. Exhibit 7 contains the statement: "Hereby there is conveyed the right and interest of first party to redeem the property aforesaid as conveyed by sheriff's deed, dated February 6, 1918, recorded February 7, 1918, in liber 1032 of deeds on page 526 in the office of the register of deeds for Wayne County, Michigan, said rights to redemption still subsisting in said first party by reason of his having been in the military service during the time when otherwise his right to redemption would have been foreclosed by the lapse of time." Exhibits 9 and 10 are receipts for City taxes paid on these lots by me for 1919, and paid by me on August 6th, 1919. I paid \$49.14 on one, and \$42.84 on the other.

BARTLETT, CHARLES L., called on behalf of the plaintiff testified as follows:

Direct examination.

By Mr. Cohane:

My name is Charles L. Bartlett. I am a lawyer and have been practicing my profession for 24 years in the City of Detroit and [fol. 68] my offices are at 515-516 Hammond Building. Dr. Harry P. Poston, the plaintiff in this case is a client of mine. I know Mr. Edmund L. Ebert, defendant in this case, and I was in his office in connection with Dr. Poston's affairs about a year and a half ago. Exhibit 5 is a check dated November 19th, 1919, and looks like the check that was tendered Mr. Ebert when you and myself were at his office on that date. The certified check was offered Mr. Ebert by you, I believe, or by myself and a demand was made for the contract on the property.

Q. What was Mr. Ebert's answer?

A. We could not get a definite answer out of him.

Q. Do you recall whether or not there was a mortgage against this property; which we were asking a discharge for?

A. Yes, I believe there was.

Q. Did Mr. Ebert accept the tender?

A. He did not.

Q. Do you know anything else about this transaction?

A. No, sir, except that I called Mr. Ebert, I believe, by telephone, in the presence of Mr. Warren later. Mr. Ebert refused the tender, on the same day of the issuance of the check.

Cross-examination.

By Mr. Groefsma:

Q. Just you and Mr. Cohane and Mr. Ebert were the only persons present?

A. I think so, yes.

Q. In Mr. Ebert's office?

[fol. 69] A. Mr. Ebert's office, yes.

Q. Was there any other conversation in the nature of a threat made at that time in case Mr. Ebert would not take the check, that you recall?

A. What do you mean by threat?

Q. A threat by Mr. Bartlett, in the sense of a penalty that would be imposed upon Mr. Ebert in case he refused to take the check.

A. No, I could not say that.

Q. Do you recall whether anything was said about pressure that would be brought to bear upon Mr. Ebert by the American Legion or any other organization in case he refused to accept this check?

A. No, I do not.

Q. Do you remember making a statement to Mr. Ebert unless he accepted this check he would be run out of town, or words to that effect?

A. No, I never made any such statement as that.

Q. And that Mr. Keary would suffer the same fate in case he did not accept it, in his behalf?

A. I never heard of Mr. Keary until this moment, I never saw him before.

Q. Had not the Doctor been to see you about his legal rights in this matter?

A. Yes he had been to see me.

[fol. 70] WARREN, MR. WILLIAM W., sworn in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Cohane:

My name is William W. Warren, and I am General Agent for the National Life Insurance Company, with offices at 433 Majestic Building. I know Mr. Ebert and met him in his office with Dr. Poston somewhere about September, 1919, subsequent to the Doctor returning from service. A day or so after the Doctor entered the military service I went to see Mr. Keary, and he told me that the property had been disposed of to Mr. Ebert. I said who is Mr. Ebert. He says, he is right here, and he goes around the corner of the office or the next adjoining office to his and brings Mr. Ebert in, in the same suite. I then wrote to Dr. Poston and told the Doctor of the circumstances of my visit to Mr. Keary's office and meeting Keary and Ebert and what they said. That was the first time I think that the Doctor knew that the mortgage had been sold or foreclosed, which had happened a good many months before that. Subsequently, in September 1919, I was in Mr. Ebert's office with Dr. Poston.

Q. What took place at that time?

A. The proposition was of Mr. Ebert's making a settlement with the doctor. I can't recall clearly the exact conversation, but the Doctor told Mr. Ebert what he would take for the lots, and Mr. Ebert substantially said it was too much, however, he would refer it to Mr. Keary, take the matter up with Mr. Keary, or words to [fol. 71] that effect. The Doctor asked, as I recall it, about \$600.00 a lot. Mr. Ebert answered that it was too much, or words to that effect, but that he would consult with Mr. Keary and see what price they would pay the Doctor.

COHANE, LOUIS, a witness sworn on behalf of the plaintiff, testified as follows:

Direct examination :

After Dr. Poston returned from the military service he advised me that Mr. Keary and Mr. Ebert were negotiating with him for the purchase of these lots from him, until finally in November, 1919, Dr. Poston informed me that the amount of \$1,735.93 was the amount fixed by Mr. Ebert as the amount necessary to redeem these lots from the mortgage foreclosure, and that he had telephoned Mr. Ebert that he had the check ready and that when he did that that Mr. Ebert requested that Dr. Poston bring with him his army discharge. I then told the Doctor that I had better take the check over and the army discharge with it and see Mr. Ebert myself. I went into Mr. Ebert's office with this check, the exhibit in this case, in the sum of \$1,735.98 and offered it to Mr. Ebert as a satisfaction of the Keary claim on account of the mortgage, costs and expenses. Mr. Ebert did not question the amount of the check, he did not question the manner or form of the tender. He asked to see the army discharge, he wanted to make notations from it, and I read to him the notations from it that he requested, and I also permitted [fol. 72] him to examine the army discharge; after examining the army discharge Mr. Ebert said that before he could say whether or not he would accept the check he would have to consult with his counsel. He did not claim at that time that the mortgage foreclosure was valid, he merely said he would have to take the matter up with his attorneys. I communicated with Mr. Ebert some time later for the answer of his counsel and was not able to get it at that time. I think he mentioned two men as the attorneys, one of whom was Smith, and the other whose name I have forgotten, he gave me no definite answer then. Then, subsequently, I went in with Mr. Bartlett and again tendered the same check. At that time Mr. Ebert said that he had not yet taken the matter up with his attorneys, not gotten the answer, and Mr. Bartlett insisted that Dr. Poston had been in the military service and he knew whether or not he wanted to accept that check, and that we were entitled to an answer then as to whether or not he would accept this check in redemption of that mortgage, costs and expenses. Mr. Ebert did not

give an answer. He said he would have to get it from his counsel. And subsequently, on January 13, 1920, I went with Dr. Poston to the office of the Register of Deeds for Wayne County. I have forgotten the name of the man, but the Deputy Register of Deeds was there and I offered to pay off the amount of the mortgage as he calculated it, having with me a certified check in the sum of \$1,850 as exhibited in this case, and \$200 in cash. The Deputy Register said that he did not know whether or not he could accept it, and I had to see the Ass't Prosecuting Attorney. I insisted upon our rights to redeem and offered the check and the money, and the [fol. 73] Deputy Register of Deeds would not accept it as a satisfaction of the mortgage.

Cross-examination.

By Mr. Groefsema:

The tender by check to Mr. Ebert was made as of the date of the check, November 19th, 1919.

KEARY, ANDREW J., recalled.

Cross-examination.

By Mr. Cohane:

The mortgage on 20 lots at \$200 per lot has been paid off on all except 8. Since I was in court last, I have not prepared the figures which would show what is due upon this mortgage at this time. Originally there were 20 lots covered in this mortgage.

Q. Mr. Keary when you were last on the witness stand I asked you a great many questions with reference to the letter of July 24, on the theory that the letter was written to Dr. Poston. Do you know whether or not such a letter was written by you to myself, Louis Cohane?

A. I have no recollection of writing any such letter.

Q. So, that in substance your answers to the questions previously asked with reference to the letter having been written to Poston, the same answers apply to whether or not such a letter was written to Cohane?

A. I gave you a statement of what was due on the property at that time.

Q. And you never wrote to me that you know of?

[fol. 74] A. I do not recall a conversation with you over the telephone on or about July 24th, 1919, or that you said over the telephone that Dr. Poston was ready to redeem the lots from the mortgage and that Mr. Ebert said that that would be all right, and that you called me as the mortgagee to give you the figures as to how much was due on or about July 24, 1919 on the mortgage. I have no recollection of your saying you would like to have me send you

that statement in the form of a letter, and that I said that if you would hold the line just a minute I would pull the notes out of my pocket and I could give you the figures over the phone. I never had any talk with you over the telephone before I gave you the figures in which you requested that I put it in writing, so that you might check up on the items of expense, as to the sheriff's fees and advertisement fees, and so forth, and you requested that I send it in the form of a letter.

Q. You don't recall sending any such letter at all?

A. No, sir, I do not. The mortgage was paid off as to all the lots except those involved in this law suit.

LORIMER, Mr. DAVID I., sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Cohane:

My full name is David T. Lorimer, and I am 53 years of age. I have lived in Detroit practically all of my life. I am at present with the Detroit Trust Company, manager of their real estate department, [fol. 75] and have been for the past fourteen years. I am familiar with values of lots all over the City including those lots in question in this case, on Gallagher just north of Davison. I saw those lots just last Saturday or Sunday. These lots in February of 1918 would be worth \$550 to \$600 a lot. In September, of 1919, the lots would be worth about \$100 more. In September of 1917 those lots were worth about \$450 each. These estimates are conservative estimates made by me as based upon my knowledge of real estate conditions in the City of Detroit at that time in regard to loans. I examined these lots again yesterday. I don't think these lots are worth as much today as they were in 1919 on account of the terrible depression at the present time. In other words, our panic, on account of the money situation for building loans.

Cross-examination.

By Mr. Groefsema:

Yes I have seen the property, I am at it all the time. I was out there two weeks ago on a loan on Gallagher. I am appraiser for the Detroit Trust Company for the purpose of making loans. In making appraisals for the Detroit Trust Company for the purpose of making loans, I always place a value on the lots separately, and then on the building separately. My report always goes in separately.

[fol. 76] Redirect examination.

By Mr. Groefsema:

We had some loans out in that district in 1918.

SLOBIN, SAMUEL K., sworn in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Cohane:

My name is Samuel K. Slobin, and I live at 1411 Burlingame, in the City of Detroit, where I have lived since 1905. I have been engaged in the real estate business since 1910, operating chiefly in Hamtramck, where the lots in question in this case north of Davison on Gallagher Avenue, are located. I have been operating in that section for the last nine or ten years, and I am therefore familiar with values in that vicinity. These lots were worth \$600 each in September of 1917, and on February 5th, 1918, or thereabouts, they were worth from \$100 to \$125 more, I figure about \$700, \$725. In September of 1919 they were worth about \$100 more. I myself own lots on Gallagher. At the present time these lots ought to be worth about \$900 each. As a real estate man I bought and sold lots in this district for a commission.

Cross-examination.

By Mr. Groefsema:

I should judge these lots would be worth 10% less than the figures I have already given for cash. At the present time there is no demand for lots, on account of the business depression and the money [fol. 77] stringency. I saw these lots yesterday.

COHANE, LOUIS, a witness for the plaintiff, being recalled to the witness stand testified as follows:

Direct examination:

On or about July 24, 1918, I called Mr. Kearny on the telephone at the telephone number of Mr. Ebert in the Majestic Building and I spoke to him personally, I asked for Mr. Keary, and a man who said he was Mr. Keary spoke to me personally. I told him that I had been informed by Dr. Poston that he was going to clear these lots of the mortgage and that Mr. Ebert had said it was all right with Mr. Keary, that I called Mr. Keary in order to get the figures that it would take, the money that it would take to redeem these lots from the mortgage. Mr. Keary said he could give me those figures immediately if I would just hold the line, he had the figures handy. He gave me a total sum of \$1,948.39, but I requested that he send it to me in the form of a letter. He asked why I needed a letter when I had the figures over the telephone and I told him that I wanted the letter in order that I might check up the various items that constitute the total that he gave me as to the sheriff's

fees and interest, register fees, tax stamp, legal news, attorney, etc. That letter was sent to me, fixing the amount which he would take to redeem the lots from the mortgage.

Cross-examination:

By Mr. Groefsema:

Paper marked Exhibit A offered and received in evidence, being [fol. 78] a sheriff's deed covering the lots in question in this case.

Q. Are you quite sure, Mr. Cohane, that it was Mr. Keary that you talked to on the 'phone on that day?

A. I only know that I called him, I called Mr. Ebert's number by telephone; the gentleman who said he was Mr. Keary spoke to me and I know that I have seen Mr. Keary there a number of times and I know that I have been informed by Mr. Ebert that he comes there about every day, I think he fixed the time that he came there between 3 and 5 every day.

Plaintiff rests.

Mr. Groefsema: At this time, in behalf of the defendants, I make a motion that the Bill of Complaint be dismissed on the ground that all the testimony in this case, is undisputed, the mortgage foreclosure, sale, recorded——

The Court: I don't want to interrupt you at this time, but suppose you put your motion formally on record, then produce such testimony as you want and I will hear you in the closing.

KEARY, ANDREW J., called by the defendant, testified as follows:

Direct examination.

My Mr. Groefsema:

At the time I made this loan, my best judgment was that the lots were worth \$350. During the time that this mortgage was in force against that property, I was not satisfied with my security, as it was too near the danger limit. I have been in the real estate [fol. 79] business about ten years, but I do not claim to be an expert. At the time of the sheriff's sale in February, 1918, I do not consider that the lots were worth as much as they were when I made the mortgage loan. During the time the mortgage was in force I paid \$296.80 for sidewalk taxes as shown by Exhibit B, and Exhibit D is a receipt for \$8.86. Exhibit C is for sidewalk tax. Exhibit D is for Wayne County tax. Exhibit C is tax receipt of 1919 for \$14.32.

Mr. Cohane: What is the date of payment.

Mr. Groefsema: The date of payment being on December 31, 1919.

At the time the mortgage was given, there was only one abstract

given. At the time of the sale of these 8 lots, I provided abstracts for all of them. They cost me \$49.00, for them all, seven in all, and certifying the same cost me \$19.50.

Q. You are not the owner of these lots at the present are you?

A. No.

Q. Did you sell them?

A. Yes, sir.

Q. Before the suit was started in this suit?

A. Yes, sir.

Q. How much did you get for the lots?

A. I got \$325 a lot.

At the time of the sale there were sidewalks on these lots. I don't know whether or not there was water. I don't remember any telephone conversation with Mr. Cohane. I remember having a talk with Dr. Poston before the mortgage foreclosure sale, asking [fol. 80] him what we could expect of him, and he said he could not pay. I told him that I would have to take action to collect. I think I set a time for him to pay it, furnished Mr. Cohane with a statement of the amount due. The purpose in doing that was because Mr. Ebert asked me at the request of Mr. Cohane who wanted the amount due me on the lots on that day, and I sent the statement to Mr. Cohane, what was due, it is a matter of record what is due me, the amount of the mortgage and the expenses attached to the foreclosure and taxes, etc., and interest.

Q. Before this Bill of Complaint was filed, and before you had resold the lots, Mr. Keary, were you at any time willing to accept the money from Dr. Poston?

A. Before the lots were sold?

Q. No before this suit was started.

A. We were willing provided the Doctor could show us that he had any rights in the lots.

Q. Provided he could show you he had any rights there?

A. Yes, if he had any rights there, we never objected to it if he could show his rights, we never objected to respecting his rights if he had any.

Q. That is his rights relating to the question whether the military service had any effect upon this foreclosure sale?

A. Yes. I instructed Mr. Ebert we would insist on seeing the Doctor's military service before respecting his rights, if he had any, that is all we asked, to show his military service. I think I later saw it. The Doctor did not show me. The Doctor disappeared when asked the question, he did not report any more. The next [fol. 81] we heard was from his attorney, as soon as we talked military service to the Doctor he dropped the subject as far as we know, he said nothing more to us as far as we know, but it appeared in the attorneys' hands later. However, I would say here, that we were obliged to send to Washington to get the record of that military service, and before we got anything we sent to Washington for it. Exhibit E is from the Adjutant General's Office, Washington, and is the record of military service of the Doctor. Yes, we

could not get the Doctor's record. If the Doctor had supplied the record, we would not have sent to Washington for it.

Cross-examination.

By Mr. Cohane:

We were not able to get any information as to the Doctor's military record until we wrote to the War Department and got that. I could not tell you the date on which I sent for it. The envelope in which the service record was enclosed is marked Exhibit F, and contained a letter on the stationery of the War Department, Adjutant General's Office, and is dated March 16th, 1920. The letter is addressed to Honorable Frank E. Doremus, House of Representatives,—Dear Sir: In reply to your letter of the 13th inst. in which you enclose one from Mr. Edmund L. Ebert, Detroit, Michigan, herewith returned, relative to the record of the military service of Dr. Harry P. Poston, formerly 1st Lieutenant, Medical Department, U. S. A., I have the honor to enclose herewith a statement of service in the case of the above named former officer, prepared in accordance with the records [fol. 82] on file in this office, very respectfully, P. C. Harris, Adjutant General, Per—some initials. I think Mr. Ebert told me of a conversation which you had with him in his office with reference to the Doctor's military service on or about November 19th, 1919. I don't remember whether he told me that he made notations from that military discharge paper as to when the Doctor had been appointed, September 24, 1918, and as to when he was discharged May 14, 1919. I don't remember, he might have said so, possibly he did.

Q. Didn't he tell you that he received this Exhibit 3 at the same time that he was offered this check in the sum of \$1,735.93, of date November 19, didn't he tell you he had seen the discharge at the same time?

A. He might have said so, I don't know, I wouldn't say.

Exhibits shown a few moments ago and introduced in evidence by my counsel were for State and County taxes, part of them. I don't think any of them were for City taxes. I don't know now by whom the City taxes were paid, or whether they were paid by Dr. Poston. I don't know the date from memory as to whether or not the taxes were paid by me December 31st, 1919 after the tender had been made to me of the check dated November 19, 1919, that I paid the City and County taxes. I transferred the lots to Mr. Ebert in December, 1919. The deed was dated December 19th, 1919. I have testified that I got the abstracts. I did not attempt to get the old ones.

Q. Did you ever make any objection to the tender made by the plaintiff for the redemption of these lots because of the fact that he had not offered it to you in gold coin instead of by certified check? [fol. 83]

A. He never offered me any tender except that check.

Q. If it was a certified check, it would have been the same as gold? I think I have a copy of plaintiff's exhibit 11 at home. I don't

think I have shown it to my counsel, I am not positive that I have a copy.

Q. You did not consult Mr. Ebert or your counsel before you wrote this?

A. No, it was through Mr. Ebert's instructions I wrote it though.

Exhibit 11 offered and received in evidence. It is dated Detroit, July 24th, 1919, Mr. Louis Cohane, Attorney, 705 Free Press Building. Dear Sir: Below please find figures showing amount due on Lots 32, 35, 37, 39, 41, 43, 45, 47, Sunnyside Subdivision, Mortgage September 25, 1916, by Eddie Hulett and wife, interest computed to August 5th, 1919, but deduction can be made should payment be made before that date. Yours truly, signed, A. J. Keary. November 8, 1917, principal \$1,651.37. Interest \$28.02; Sheriff, \$3.00; Register of Deeds, \$2.50; tax stamp, \$2.00; legal news, \$24.75. Attorney, \$35.00, due February 5, 1918, \$1,756.64, interest to February 5, 1919, \$122.96, total, \$1,879.60, interest to August 5, 1919, \$65.79. Due, August 5, 1919, \$1,945.39. Exhibit 12 is the envelope in which this letter was sent, with my typewritten return address. I could not identify it.

Q. Just look at it.

A. Yes, yes.

Exhibit 12 offered and received in evidence, without objection. It is the envelope enclosing Exhibit 11, and is post marked Detroit, [fol. 84] July 24, 5 p. m., 1919, addressed to Mr. Louis Cohane, 705 Free Press Building, City. Return address on the other side, A. J. Keary, 309 Majestic Building, Detroit, Michigan.

Q. Mr. Keary, that 309 Majestic Building, Detroit, Michigan is the office of Mr. Ebert, is it not?

A. Yes, sir.

Q. And that is where your office is?

A. I haven't any office.

Q. Is that where you received your mail?

A. No, sir.

Q. You put your return address on Exhibit 13 didn't you?

A. I did.

Q. You wanted that mail returned to you there if it was not delivered?

A. Yes, sir.

Redirect examination.

By Mr. Groefsema:

Q. Did you know about the Doctor's military service at the time this was sent—you knew something about it, they had told you something about it, had they? The Doctor had or someone had?

A. What is the date of that please?

Q. July 24, 1919.

A. I presume we had heard about it, I could not say, I would not say whether I saw that record at that time or not, I would not testify I did, I don't remember those dates.

[fol. 85] Recross-examination.

By Mr. Cohane:

I remember seeing Mr. Warren just a few days after Dr. Poston had entered the service, and he told me that the Doctor was in the service. I did not tell him that the property had been sold to Mr. Ebert on mortgage foreclosure, I don't think so, it was not sold at that time.

Q. On the mortgage foreclosure?

A. I don't know.

Q. You don't know. Do you remember at that time that Mr. Warren offered to pay you the interest on the mortgage to that date and you said you could not accept it because the property had been sold on mortgage foreclosure?

A. I don't know, maybe I did, I don't know, I would not say one way or the other.

EBERT, EDMUND L., sworn in behalf of the defendant, testified as follows:

Direct examination.

By Mr. Groefsema:

My full name is Edmund L. Ebert, and I am a real estate broker and have been for twenty years. My offices are at 309 Majestic Building. I have been there for twenty years, not in that particular room, that length of time. In September, 1916 I secured a loan for Mr. and Mrs. Hulett, from Mr. and Mrs. Keary, represented by the mortgage in this case. At that time I was at 309 Majestic Building. [fol. 86] My experience respecting real estate values and the appraisal of them in the city in brief is that I have looked at hundreds of pieces of property for customers and for myself for the purpose of making loans, and buying and selling both vacant and improved property. At the time the mortgage was made, on September 25th, 1916, I told Mr. Keary these lots were worth \$350 each. On February 5th, 1918, at the time of the sheriff's sale there was very little demand for vacant on account of the war with Germany.

Q. Do you know whether any improvements were put into that section of the city subsequent to the execution of this mortgage?

A. Yes, sir.

Q. What were they?

A. Sidewalks, water, electric light.

I don't know positively whether they were put in before or after the mortgage foreclosure sale.

Q. What value do you place upon the lots at this time independent of any improvements or buildings?

A. Just the lots, say with the improvements?

Q. Yes.

A. Why it would be difficult, very difficult to get \$500 cash for them.

Q. Have you any property in that section, vacant?

A. Yes, in that particular block, both houses and lots.

I would be willing to sell them for \$500 cash. I have been trying to sell them for 8 or 9 months for \$500 apiece, but could not sell them, including the improvements that are there.

I have forgotten the exact date when I first heard of Dr. Poston's military record, or military service. Mr. Warren came into the [fol. 87] office, he was a stranger to me. I notified him by letter about three weeks before the mortgage was due. I called him several times afterwards, and told him that Mr. Keary insisted on the principal and interest of that mortgage being paid. I kept following him up, and Mr. Keary was after the money repeatedly. So when Mr. Keary came in my office, he said "Heard anything from Dr. Poston?" I said "No, I guess I had better telephone him." I called the doctor on the telephone, and he told me, he said, "I have been speculating, I am broke, I can't pay anything." So I said "I guess you had better tell that to Mr. Keary because he won't wait any longer." Mr. Keary stepped to the telephone. I heard Mr. Keary say "Well, doctor, if you can't set the time when you will make the payment, I will set the time, and starting immediately," right there in my presence. After that communication and those telephone conversations the matter was placed in the hands of an attorney for foreclosure. Attorney S. Reed Smith handled it. Exhibit 2 is the original mortgage. I was not present at the time these lots were sold on the Sheriff's sale. They were bid in for the defendant by Norman H. Choate who was associated with me in my office. Exhibit A is the sheriff's deed, offered and received in evidence, without objection. Also the original mortgage likewise. After the mortgage foreclosure sale, I first heard that Dr. Poston was in the military service. Since the Doctor's return from the military service, I had several conversations with him respecting his military service.

Q. Now the records introduced so far, Mr. Ebert, as I recall them, show that Dr. Poston enlisted in September, 1918 and was discharged May 14, 1919?

[fol. 88] A. Quite a time after that, because I remember the Doctor telling me after he had been discharged he had been away visiting, he had been away for several weeks, I remember that positively, so I set the date from that, it probably was about July or August, 1919. Some time after that I saw the doctor's military service record. I cannot remember the exact time.

Q. What was the conversation that took place between you and the doctor respecting these lots, and the military service record.

A. In regard to military service?

Q. Yes.

A. I told the doctor I had received positive instructions from Mr. Keary to find out his military service record, that if he intended to redeem it depended absolutely upon his military service as to whether Mr. Keary would give him any right to redeem, he was

perfectly willing to deed back if the doctor was legally entitled to it, and that the doctor was to produce his military service.

Q. Did you ask that?

A. I did, yes.

Q. Were you furnished with it?

A. From Dr. Poston?

Q. Yes.

A. No, sir.

Q. Did you write for it?

A. I did, yes.

Q. What did the Doctor say when you asked him for his military record?

A. Well, he seemed greatly surprised and said that he would show it. I subsequently wrote to Congressman Frank Doremus at Washington.

[fol. 89] I received a reply from the War Department, although I could not fix the date without seeing the paper. Subsequent to the mortgage foreclosure sale, I purchased the lots from Mr. and Mrs. Keary for \$325 a lot. I thought that was under the market price. Before making the purchase I consulted four attorneys respecting Mr. Keary's title in these lots, and relying upon their advice, I purchased them. I consulted Attorneys S. R. Smith, Elmer H. Groefsema, Ezra Frye, and another attorney over in the Dime Bank Building that used to call at the office, I have forgotten his name. I do not own any of the eight lots at this time.

Q. When did you resell them, do you recall whether it was before or after this suit was started?

A. Why, I think I sold them after the suit was started, I think so, I don't remember the date of the suit, I was not served with papers at that time.

Q. The suit was started—this will refresh your recollection—on the 19th of August, 1920.

A. 19th of August, 1920.

Q. Yes.

A. I had sold the lots previous to that, I am almost certain, yes.

Q. To whom?

A. Mr. Edwards, a builder.

I sold them to a Mr. Edwards, a builder, and there are now houses on these lots. At the present time, I have no interest in these lots because I have been paid in full the contracts. I remember Mr. Cohane calling at my office with respect to the Doctor's right to redeem. There were several consultations on that point.

Q. Do you recall about when that was?

[fol. 90] A. This was some time after I had told Dr. Poston it was necessary to produce the military record. The Doctor never appeared after that. Mr. Louis Cohane appeared several weeks, I think after that and he said he represented Dr. Poston and he said that he came over to explain the Doctor's military record and that he had looked it up and he was of the opinion that the Doctor had several months to redeem. I told him then that Mr. Keary insisted

positively that the Doctor would have to prove to the satisfaction of his attorneys that he had a legal right to redeem, before he would do business with the Doctor, and I then made an appointment for Mr. Cohane to meet Attorney Smith representing Mr. Keary at my office to talk the matter over.

Q. Was the date of the doctor's service and the date of the mortgage sale and the recording of the deed gone into?

A. Everything, they had a long conversation, it must have lasted half or three quarters of an hour I guess, and that was everything, that was the whole thing they talked about, the doctor's legal right to redeem, as Mr. Keary had positively insisted on that point.

Q. It was figured out at that time as to how long the Doctor had been in the service, was it?

A. Yes they had the dates.

This was in my private office. It was some time later that a check was tendered at my office.

Q. Did you see it, Mr. Ebert?

A. Mr. Cohane, Mr. Louis Cohane came in my office, and he said [fol. 91] Mr. Ebert, I would like to leave a check for Mr. Keary. I said is that in reference to Dr. Poston? and he said, yes. I said Mr. Cohane, I have positive instructions from Mr. Keary not to accept any money on that deal, you will have to take it up with Mr. Keary, and I said furthermore, instructions are that you will have to prove to the satisfaction of his attorneys the same as we talked before, as to the Doctor's legal right to redeem. If you can show the Doctor has a legal right, Mr. Keary told me that he was perfectly willing to re-deed the lots without any litigation of any kind and he was very anxious to avoid litigation.

Defendant's Exhibit G, deed dated December 18, 1919, and recorded April 26, 1920, received in evidence.

The tender check is dated November 19th, 1919, for \$1,735.93. From the reading of that date, does that refresh your recollection as to about when that was?

A. I did not handle the check, Mr. Groefsma, and I am not positive as to the date. I made no notation of it.

Cross-examination.

By Mr. Cohane:

I have been a real estate dealer for twenty years, and I consider myself competent. I recall when you brought the military service discharge papers of the doctor to my office, and I remember that I wanted you to leave them with me. You told me you could not do so. I remember that I requested that I be permitted to examine them, and that I was permitted to do so; that I made notations from it as to when the doctor entered the service, when he had been discharged, and other things from that record. I do not recall that [fol. 92] on or about November 19th, 1919, you offered the check for \$1,735 odd dollars. As to the doctor's military service, I wrote it down on a pencil memorandum.

Q. So that when you wrote to Congressman Doremus on the day you mention, you had that information in your files, didn't you?

A. I don't think I had it at that particular time. I had an object in writing. I wanted to dispose of the lots, and I knew on account of the doctor having been in service it would be necessary to prove to the satisfaction of someone, possibly necessary, as to the doctor's service record. I wanted that official service record to show to anybody that I might dispose of the lots to, exactly. The first time I had any intimation or idea that the doctor was in the military service was when Mr. Warren came into the office and told me. Mr. Warren came in and asked for Mr. Keary, and I took Mr. Warren into the other office and introduced him to Mr. Keary, and he asked Mr. Keary regarding the mortgage of Dr. Poston, and Mr. Keary replied that he had foreclosed, and Mr. Keary told Mr. Warren at that time that he did not know that Dr. Poston was in the military service. At that time I did know what Mr. Warren said, that Dr. Poston was in the military service. I know you were not in my office subsequent to the time that suit was started in this matter. I remember going over to your office after suit had been started, and service had been made on Mr. Keary, but no service had been made on me of the bill of complaint in this case. I did not tell you at that time that I had bought the property.

Q. Why didn't you?

A. I don't know as I bought it at that time, I don't remember.

[fol. 93] Q. You had bought it before that time, hadn't you?

A. I don't know. How do you know that I bought it before that time?

Q. When you bought the lots on December 18, 1920, that was subsequent to the time that suit had been started in this case, wasn't it?

A. I have forgotten the dates.

Q. The deed is December 18, 1919, you had bought the lots before suit was started?

A. Bought them the day of the deed.

Q. That is before the suit was started?

A. I don't remember the date suit was started.

Q. Don't you remember that suit was started in 1920?

A. I don't remember the day.

Q. You don't remember you were in my office to see me in August or September, 1920?

A. I said I was in your office, but Mr. Keary had been served, I had not been.

Q. You did not tell me at that time you had bought these lots in December?

A. No, didn't say anything to you about it, no. When I bought this property in December, 1919, I was familiar with the title. I don't remember particularly that I examined the records in the Office of the Register of Deeds of Wayne County, Michigan, before I bought this property. I don't remember whether I had an abstract certified and brought down to date. I paid \$2,600 cash for this property.

Q. You knew the title was in question?

A. Oh, no.

Q. Didn't you know sufficient that it was in question to make you consult four different attorneys about it?

[fol. 94] A. I found out that there was no cloud on the title, the doctor was trying to cloud the title in order to shake the Christmas tree, but we stated——

Q. You found out there was no cloud on the title?

A. No cloud on the title.

I conferred with different attorneys in regard to the Soldiers and Sailors Act that you have been talking about as to whether that would entitle the doctor to redeem the lots, and each and every one told me he was out months before. I don't remember in regards to this particular deal examining the records in the office of the Register of Deeds.

Q. At any rate you knew it was claimed by the attorneys for Dr. Poston at the time that the doctor had a right to redeem, you knew that, didn't you?

A. I didn't know that he had any attorneys at that time.

Q. Didn't know that, that I or Mr. Bartlett claimed for him that he did have a right to redeem?

A. You were the only one that claimed to be the attorney. Bartlett never claimed. You said that the Soldiers and Sailors Act gave him the right to redeem, that is what you said.

Q. Yes, you knew that he claimed that through me before you bought the lots?

A. I heard what you said, and didn't believe you. I didn't believe you and I consulted four other attorneys who said you didn't know what you were talking about. I did not file a bill to remove the cloud from the title after it was claimed that the doctor did have a right to redeem. Before I got the property I got one abstract from [fol. 95] Mr. Keary and his promise that he would furnish be an abstract for each and every lot. I had the abstract brought down to date. I don't think that I knew at that time that there was a deed on record, Exhibit 7, in this case, recorded in the office of the Register of Deeds for Wayne County, Michigan, on December 16th, 1919.

Q. When did you sell these lots to Mr. Edwards?

A. I would have to look up my papers to show the exact date.

Q. You know that you were ordered to produce in this case all the records, papers, writings and documents of any kind and character relating to the property in controversy in this case, didn't you?

A. Mr. Groefsma did not say anything to me about it. I have the records over to the office. I will bring them in this afternoon.

Q. All the records of any kind and character pertaining to this property in your possession or control. Will you bring them over this afternoon at 2 o'clock?

A. I will if I am ordered by the court.

Mr. Cohane: All right, I will ask the court to order it.

Q. How much did you sell them to Mr. Edwards for?

A. Why should I tell you?

Q. I am asking you.

A. I won't answer unless I have to.

Q. You are a witness on the stand.

The Court: Take an answer.

Q. You have an attorney to take care of your rights, it is not for you to object, it is for your attorney.

The Court: Take an answer.

A. I sold them on builder's terms, if I remember correctly, \$50 [fol. 96] down, \$550 including sidewalk tax paid in full and an abstract for each lot. I sold them to Mr. Edwards a few months after I bought them. I gave Mr. Edwards eight abstracts brought down to date before I transferred them to him.

Q. Eight abstracts certified to date before you transferred them to Edwards?

A. I brought one abstract down at that time, covering eight lots that was certified to date. That was after he made a deposit and I think then before I gave the deed. I think he deposited \$50 on each lot. In the receipt which I gave him for this deposit, I agreed that I would furnish an abstract before the deal was closed, and that the abstracts had to show a good title.

Q. Have you got a copy of that receipt or the receipt itself?

A. I don't know, I think I have, I am not certain.

Q. Will you bring that into court at 2 o'clock?

A. I am not certain as to that.

Q. Bring that in. You got your deed on December 18, 1919. How does it happen you did not record your deed until April 26th, 1920?

A. Because I did not record it until that date.

Q. That is how it happened?

A. That is how it happened.

Q. Any particular reason why it was not recorded?

A. I did not record it.

Q. No particular reason why you did not record it, was there?

A. (No answer.)

Q. Mr. Ebert, as a real estate man of 20 years' experience, you knew that if you had a deed that was not recorded nobody was bound by any notice of your rights as long as your deed was not recorded, didn't you?

[fol. 97] A. Yes, I had an object in not recording it.

Q. What was the object?

A. Acting under the advice of Mr. Groefsma, he told me not to record the deed at that time.

Q. What reason was given?

A. He thought you could come——

Mr. Groefsma: I object to that as being privileged.

The Court: I think that is privileged.

Mr. Cohane: I don't know that counsel can claim the privilege unless the client does.

Mr. Groefsma: I claim it in his behalf.

The Court: All right.

Mr. Cohane: A privileged communication? Does it come within the privilege?

The Court: A communication made between attorney and client.

Mr. Cohane: Is the communication of such a nature so concerning matters in this case as to come within the privilege?

The Court: I think it does.

Q. Then you refuse to answer the question as to why you did not record your deed for four months thereafter on the grounds that it was on the advice of counsel and that it is a privileged communication and you do not have to reveal why you did not do it, is that right?

A. Yes, sir.

You never tendered me a check. Never. Mr. Bartlett and you were never in my office at a time when he and you tendered me a check. No.

Q. Well, have you seen that army discharge before?

A. I would not say as to this particular discharge.

[fol. 98] Q. Does that bear the same notations as to the entry into the service and his discharge as you made at the time?

A. I haven't my notations here.

Q. You have them at your office.

A. No, I don't know, I don't think so, no.

Q. Do you recall at the time I did confer with you as you say, for half or three-quarters of an hour that I made the claim to you that the period of redemption could not run as against the doctor while he was in the military service?

A. You made the claim?

Q. I told you that the period of redemption could not run against him during the time that he was in the military service?

A. That was your opinion you said.

Q. But you had notice at that time of what Dr. Poston's claim was through his attorney that the period of redemption could not run against him while he was in the military service?

A. I remember your mentioning that, yes. That was quite a long time before I got my deed. I remember the time when you and Mr. Bartlett were at the office to see me. You did not offer me any checks, certified checks, at all.

Q. I take it that in all these conferences with Dr. Poston and myself and Mr. Bartlett with reference to these lots you were acting as agent for Mr. Keary?

A. No, I would not say that?

Q. Who were you acting as agent for?

A. I don't think I was an agent for anyone. Mr. Keary transacted business, he said, if they had anything to offer that I should tell him about it.

[fol. 99] Q. I will ask you whether or not at that time you were protecting Mr. Keary's interests?

A. I don't think I was.

Q. You don't think so?

A. No. Simply taking any memorandums or any notations, any offers that they might have, that was all. I had no authority from Mr. Keary to act for him.

Q. Did you communicate to Mr. Keary these various conferences, conversations and negotiations that you had with either Dr. Poston or myself and Mr. Bartlett and Mr. Warren, did you communicate these to Mr. Keary?

A. Why I had no conversation with Mr. Warren, never did have.

Q. Well, did you communicate the conversations or negotiations, conferences that you had with myself and Dr. Poston and Mr. Bartlett to Mr. Keary?

A. I only met Mr. Bartlett once in reference to that transaction.

Q. Did you communicate them to Mr. Keary?

A. I told Mr. Keary that they were in and threatened him, he and I both.

Q. You told him the conversation?

A. Yes, I told him about your threats, yes.

Q. Told Mr. Keary what the conversations were that you had with the doctor as you had them, is that right?

A. I told Mr. Keary——

Q. Is that right or isn't it?

A. I told Mr. Keary——

Q. Is that right or isn't it right?

(Question read by the reporter.)

A. I told Mr. Keary——

Q. Yes or no, is that right?

[fol. 100] A. I can't answer without an explanation, your Honor, I don't think.

Mr. Cohane: If your Honor please I submit——

The Court: The question is, did you report the conversations that you had to Mr. Keary?

A. Why in substance I did.

Q. In substance; that is all right. Now then, the negotiations and conferences that you had with me with reference to this matter, did you repeat them in substance to Mr. Keary?

A. I think I only had one meeting with you, Mr. Cohane.

Q. Did you repeat that to Mr. Keary in substance?

A. I told Mr. Keary about the meeting with you.

Q. In substance, is that right?

A. Yes.

Q. And the one that you had when Mr. Bartlett was present and I was present, you repeated that in substance to Mr. Keary, is that right?

A. You had been in and threatened him, both of you.

Q. Did you repeat in substance what happened when I and Mr. Bartlett were in the office?

A. Yes I did.

Q. You did?

A. Yes, sir.

We bid the property in at the mortgage foreclosure sale in the name of Mr. and Mrs. Keary. I know the handwriting of Mr. Choate when I see it, and I can say that the deed of Mr. Keary is in Mr. Choate's handwriting. I am positive it is not my handwriting. I am quite positive it is not Mr. Keary's handwriting. I remember [fol. 101] Mr. Choate's handwriting, and I am as certain as I can be that it is his writing.

When I sold the lots to Mr. H. D. Edwards I gave him a warranty deed as I had taken one from Mr. Keary. I feel that both Mr. Keary and myself are perfectly financially responsible, so that so far as our transfers are concerned to anybody else, if the title that we conveyed is not good we are thoroughly responsible.

I sold the lots to Mr. Edwards on terms, \$50 down and the balance of \$550 in six months or so. I gave Mr. Edwards a warranty deed for each and every lot, he and his wife, joint deeds.

Q. Now you want it clear upon this record, Mr. Ebert, that you never saw this Exhibit 5 before?

A. I would not say as to that, Mr. Cohane. I will answer just the same as I answered before, that when you came in you said you had a check for Mr. Keary and I refused to accept it.

Q. You refused to accept it?

A. Yes, sir. And I took no memorandum as to the amount, date, or anything else.

I don't know whether or not I knew this car line was going in on Davison Avenue for months and months before it went in. Whether the car line was in or was not in would not affect the value of the lots to more than 5 or 10%. I think the car line was in September, 1917. If I remember correctly, there were two or three houses in the block at that time when we went out there. I don't know whether or not they were built by Mr. Edwards. I didn't know that in November of 1919 Mr. Edwards had offered Dr. Poston \$600 each for these lots.

Q. Mr. Keary testifies that you are carrying now for him about [fol. 102] 50 or 60 mortgages. Don't you keep any record of what the principal is on each one of these 50 or 60 mortgages, how much the interest is and when it is due?

A. No, no, he gives me a monthly statement, Mr. Cohane, furnishes me a monthly statement as to the principal and interest due on the different mortgages.

Q. You collect them for him?

A. Yes, not all. I collect most of them.

Q. So that each month you get a monthly statement from Mr. Keary, mortgage on such and such property, the mortgage is such and such a price, or the principal is so much and the interest so much?

A. Yes, he never mentioned principal unless the mortgage is due. I presume Mr. Keary furnished me on the first of September, 1919, a statement of the amount due, with the interest, costs and expenses of the Poston mortgage.

I examined the sheriff's deed before I put it on record. The

sheriff's deed was dated February 5th, 1918, and was delivered on or about February 5th or 6th, 1919. I usually go over to the Register of Deeds' office after them.

This attorney, Smith, who conducted the sale for Mr. Keary, is the same attorney whose advice I received with reference to whether or not the doctor had any rights in the property. He did some work for me. Mr. Groefsema, who is attorney for Mr. Keary, is also my attorney, and is one of the attorneys whom I consulted with reference to this matter. Mr. Frey I have known for many years in the Majestic building, in the same building as my office is.

[fol. 103] Q. Who is the other one?

A. Some attorney in the Dime Bank building that used to come in to see me with reference to some matters, I didn't know him very well, I simply took the matter up, I thought some of his opinion, that is all.

(The court then adjourned to 2 P. M.)

(Cross examination of witness Ebert resumed by Mr. Cohane.)

Q. There was a receipt that you were to bring in this afternoon showing when you sold this property to Mr. Edwards.

A. Yes, after diligent search I failed to find the paper. My record does not show when Mr. Edwards purchased the property from me. At the time I sought advice from the various counsel whom I have mentioned, I told them fairly and completely all of the facts within my knowledge as to the circumstances surrounding this deal. I presume it was on the information as to the facts which I gave them that they gave me the advice and the counsel I have mentioned here.

Q. Did any one of those counsel suggest to you that you should remove the cloud from your title of the doctor's claim by filing a bill to quiet your title?

Mr. Groefsema: I object to that as being incompetent.

The Court: I will take an answer.

A. Not that I know of, no, sir.

Q. If they had done so you would know it, wouldn't you?

A. Oh yes.

Q. Did you tell any of these various counsel that the doctor's claim was of record, having been recorded on December 18th, 1919?

[fol. 104] A. That his claim was on record?

Q. Yes.

A. I didn't know he had any claim.

Q. You didn't know that he had any?

A. No I didn't know he had any claim.

Q. You took no court proceedings of any kind or character to dispose of the doctor's claim or his claim that he had a claim?

A. I did not.

Q. Now I wonder if you recall at the time that I had that conference with you in your office that you testified to as between a half and three-quarters of an hour, did I tell you that following the

armistice November 11, 1918, doctor had made repeated and determined and stubborn efforts to secure his release from the service as soon as possible?

A. I don't remember that, Mr. Cohane.

(Paper marked Exhibit 13.)

Mr. Bresnahan: I would like to ask counsel what the purpose of this line of cross examination is.

Mr. Cohane: The purpose of this cross examination is to show that not alone was every attempt made to get the doctor out of service as soon as the emergency was passed, in order that he might care for his obligations, but that as a matter of equity, the defendants in this case knew that these efforts had been exerted.

(Paper marked Exhibit 14.)

I was not shown Exhibit 14, the reply of the officer in command to Exhibit 13.

Q. Well, have you with you any other record or papers in the nature of those spoken of this morning when you were examined that you were to bring in at two o'clock?

[fol. 105] A. No, I remember positively destroying the land contract I had with Mr. Edwards when I gave him the last deed to the last lot.

Q. You destroyed the land contract?

A. Yes, both of them, the duplicate and the original.

Q. You have no notations showing—

A. No, the other was his receipt when he made the deposit.

Q. At the time you sold the property did you tell him of Dr. Poston's claim?

A. Did I tell him about it?

Q. Yes.

A. Of Dr. Poston's claim? No, I didn't know the doctor had a claim.

Q. Well, didn't Mr. Edwards or his counsel insist that you get this record that you have in evidence here, that you got from the War Department in March, I think it was, as to the service record of Dr. Poston?

A. No, they had nothing to do with it.

Q. Did you show Mr. Edwards or his counsel that service record?

A. I did, both Mr. Edwards and—I had the service record for a couple of months before I made the deal with Mr. Edwards.

Q. What was the date you made your deal with Mr. Edwards?

A. It was after the date of that letter from Washington.

Q. How long after?

A. Sometime after.

Q. Sometime? What do you mean by sometime?

A. I would say a few months.

[fol. 106] Q. You made your deed to Mr. Edwards a few months after the date of that letter?

A. I made several deeds to Mr. and Mrs. Edwards.

Q. This deal with reference to these lots.

A. Oh. I had the service record before I deeded any of the lots to Mr. Edwards.

Q. How much before?

A. I wouldn't say as to that—some time.

Q. Some time?

A. A couple of months.

Q. A couple of months?

A. I would be guessing at it.

Q. How long before you deeded these lots to Mr. Edwards was it that you had made the contract with him?

A. If I recollect right the lots were sold on builder's terms.

Q. When?

A. When I sold them to him.

Q. When did you sell them to him?

A. The date I sold them.

Q. What date was that?

A. I haven't the contract.

Q. How long before the time that you gave Mr. Edwards a deed was that?

A. Some time.

Q. How much?

A. Well, he had six months to pay me up in full, and he paid me \$50 as I remember it on each lot, and I was to deed to him at any time, there was a release clause in the contract, any time he paid me \$500 he was entitled to a deed, on the lot, provided he was not in [fol. 107] default on the contract, and he called for the deeds at different times as he secured his loans I presume on the houses.

Mr. Edwards didn't raise with me a question as to the doctor's equity of redemption in these lots by reason of his abstract brought down to date showing the doctor's claim in the abstract, except that the attorney for the Capitol Savings & Loan Association that was examining the abstract for them on his application for a loan, wanted to be positive about it. He said that the doctor had put a quit claim deed on record which was noted by the attorney examining the abstract for the Capitol Savings & Loan Association. I showed the attorney for the Capitol Savings & Loan Association a copy of Dr. Poston's service record.

Q. So that after Edwards made his deposit and before the deal was finally closed, you furnished him with an abstract certified to date?

A. Yes, sir.

Q. Showing title to the property?

A. Yes, sir.

Q. Now, didn't Mr. Edwards raise with you a question as to the doctor's equity of redemption in these lots by reason of his abstract brought down to date showing the doctor's claim in the abstract, didn't Mr. Edwards raise that question with you?

A. Mr. Edwards?

Q. Yes.

A. He didn't raise the question. He said he was going—he was securing a loan from the Capitol Savings & Loan Association and he said some attorney that was examining for them wanted to be positive as to that.

My abstract to this property was examined by Mr. Edwards' counsel [fol. 108] and showed a deed of record previous to my giving Mr. Edwards a deed. I paid Mr. Keary \$2,600 for these lots by a check on the Peoples State Bank of Detroit, signed Edmund L. Ebert.

Q. Was it payable to A. J. Keary and wife?

A. I have forgotten about that. I think it was payable to A. J. Keary. I have forgotten about it.

Q. Did you get the deed before you paid the cash?

A. No. I received the deed before I paid the money.

Q. How much before?

A. I guess about 5 or 10 minutes.

Q. About 5 or 10 minutes before?

A. Yes, sir.

Q. So that you did pay the \$2,600 on December 18th, 5 or 10 minutes before he handed you the deed?

A. I would not say as to that, I don't know whether the deed was delivered to me on that day.

Q. Would it be within two or three days of the date the deed bears?

A. I would say so.

Q. You would say so? Have you your cancelled check with you?

A. Not here, no, sir.

Q. I think that is all.

Redirect examination.

By Mr. Groesfsema:

Q. After you issue land contracts on property that you sell, Mr. Ebert, and then give deeds, is it your practice and custom to destroy the land contract?

A. Always, I always destroy the land contract after I give them the deed.

[fol. 109] I remember Mr. Bartlett calling at my office. Mr. Cohane was with him. It was after the doctor had returned from the military service, perhaps in November, 1919.

Q. Was there any feeling of hostility existing at that time, Mr. Ebert?

A. I should say there was, we pretty near had an open fight, they threatened me, Bartlett and Cohane threatened to clean up the office.

Q. Will you state what was done by the parties that came in to see you respecting the redemption of this mortgage?

A. They said if the doctor did not redeem on those lots that they were going to close the office, that the American Legion would be back of them to close the office, and Mr. Cohane made the statement when I went over to see the sheriff that Mr. Keary and I ought to be both tarred and feathered, and I should get the heavier coat, that was the decision, after taking it up with the committee of the Ameri-

can Legion. We had it out hot and heavy. I told him just what Mr. Keary said, there was nothing doing unless the doctor could show legal proof that he was entitled to redeem the lots.

Recross-examination.

By Mr. Cohane:

I was not tarred and feathered, and I was never in any particular fear of being tarred and feathered. I had no fear whatever; I had no fear of my office being closed, and I was not frightened a bit; what they said did not bother me a bit.

[fol. 110] WARREN, WILLIAM W., recalled for further examination.

Direct examination.

By Mr. Cohane:

I fixed the date as to when I had gone to see Mr. Keary and Mr. Ebert as a day or two after the doctor entered the military service. I went to their office as a friend of the doctor for the express purpose of finding out what the interest was and how it could be settled, the doctor having at this time entered the service. I was told that it was too late to pay the interest by Mr. Keary. I was refused the right to pay the interest, for the doctor, to that date, by Mr. Keary.

Exhibit- 13 and 14 received in evidence.

[fol. 111] CIRCUIT COURT FOR COUNTY OF WAYNE

[Title omitted]

CERTIFICATE TO CASE ON APPEAL

In this cause, the evidence having been taken in open court, I hereby certify that the foregoing is the substance of the testimony at large so taken in this cause and upon which said cause was heard, and a final decree therein made by me. I hereby certify that that portion of the testimony set out in questions and answers is necessary to be so stated in order to get a proper understanding of the same; that the exhibits were introduced and read in evidence in said cause upon the hearing hereof.

That the foregoing case as settled by me contains the substance of all of the testimony in said cause on which the decree was made, and [fol. 112] the same was settled within the time prescribed by the laws and practice of the court.

Arthur Webster, Circuit Judge.

Dated Detroit, Michigan, this 12th day of April, A. D. 1922.

O. K.

Elmer H. Groefsema, Attorney for Edmund L. Ebert, Andrew J. Keary, Ella R. Keary.

THE CIRCUIT COURT FOR COUNTY OF WAYNE

[Title omitted]

OPINION—Filed Oct. 12, 1921

Plaintiff filed a bill to be allowed to redeem from a mortgage foreclosure. The sale took place February 5th, 1918, and was made under the power of sale given in the mortgage. The sheriff's deed was recorded within a few days and the statutory time allowed to redeem therefrom ran until February, 1919. In March, 1918, the Soldiers and Sailors Civil Relief Act was passed by Congress. In [fol. 113] September, 1918, plaintiff enlisted in the military service of the United States and was honorably discharged May 4th, 1919.

There is evidence in the record from which it appears that beginning about July 24, 1919, the plaintiff and defendants Keary and Eberts began a series of negotiations for either the purchase of plaintiff's interest or the redemption by plaintiff from the mortgage foreclosure. These negotiations continued over a period of several months and finally were broken off shortly before November 20, 1919. On this date plaintiff endeavored to tender the amount due to redeem but his tender was refused.

I am of the opinion that these negotiations (if commenced within the time allowed to plaintiff to redeem) would amount to an estoppel as against these two defendants at least. An agreement to extend the redemption period if made before the period expires does not need to be upon a consideration in order to make it binding. But such an agreement made after the redemption period has expired must be upon a new consideration.

Wiltzie on Foreclosure, Sec. 1145.

So, in case an estoppel is invoked, if the negotiations are conducted while plaintiff still has a right to redeem, his forbearance to exercise his right is induced by the conduct of the opposite party and the law implies an agreement to extend the time. If the right of redemption had already been lost when negotiations begin, however, plaintiff cannot be in the position of losing any rights by the pendency of negotiations.

[fol. 114] It becomes important then to determine whether on July 24th, 1919, when negotiations began, the plaintiff still had a right to redeem. The statutory period of one year expired on February 5, 1919, but it is plaintiff's claim that his service in the army, by virtue of the Soldiers and Sailors Civil Relief Act, suspended the running of this period. At the time he entered the service the statutory period had approximately four and a half months yet to run and as

plaintiff was discharged from the army May 14, 1919, it is apparent that if plaintiff's contention is correct the period for redemption ran until the latter part of September, 1919.

At the time of the argument I was of the opinion that the Soldiers and Sailors Civil Relief Act applied to the situation at bar. Since that time a study of the Act and recent decisions under it, has forced me, reluctantly, to the conclusion that the situation presented in the instant case does not fall within its provisions.

Undoubtedly the legislation in question is a valid exercise of power on the part of Congress for the commendable purpose of relieving the mind of the soldier from the worries of civil life and enabling him to devote his entire energies to the military needs, and it is likewise apparent that a suspension of the running of a statutory period for redemption from a foreclosure would subserve such a purpose. But, because the broad general purpose would be subserved is not a sufficient reason for reading such a provision into the Act, if it is not covered by express terms or necessary implication. The Act begins with a statement that "protection is hereby extended to persons in military service" etc. and then expressly limits the scope of this protection by saying "and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war." The provisions which follow deal with proceedings in court, rent and installment contracts, insurance, mortgages and other matters.

The case at bar presents a foreclosure of a mortgage, not in court proceedings, but under a statutory power of sale by advertisement. The sale was complete in all particulars more than a month before the Act of Congress was passed and seven months before plaintiff entered the military service. I can find no provision of the act which relates to a foreclosure sale completed before the soldier entered military service, and no provision expressly extending the redemption period of a foreclosure (whether in court or by advertisement) which took place before the Congressional enactment.

The section relating to mortgages deals with foreclosure sales made during the period of military service or within three months thereafter.

Manifestly, this does not concern an equity of redemption running at the time of entering the service.

Section 3078¹/₄e, of the Soldiers and Sailors Civil Relief Act provides:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators or assigns, [fol. 116] whether such cause of action shall have accrued prior to or during the period of such service."

I cannot see how this section, in effect, adding the term of the military service to the period limited

"for bringing any action by or against a person in military service"

can be extended in scope so as to include a right of redemption after foreclosure given by statute. It is not necessary to have an action of any kind either by or against the person in military service; at the end of the statutory period, by mere lapse of time, title vests.

An examination of the Soldiers and Sailors Civil Relief Act has satisfied me that (whether designedly or through oversight) it has failed to cover the case of a statutory redemption period which began to run before the passage of the Act. This being true, plaintiff's right to redeem expired February 5th, 1919, and the negotiations between the parties cannot be invoked by plaintiff as an estoppel, since they were had at a time when the right to redeem had been entirely lost.

In this view of the case, it is not necessary to pass upon the claim of counsel for defendants that Mrs. Keary could in no event be considered a party to the negotiations or subject to any claim of estoppel arising from them.

A decree dismissing the bill may be entered by defendants.

Arthur Webster, Circuit Judge.

October 12, 1921.

[fol. 117] IN THE CIRCUIT COURT FOR COUNTY OF WAYNE

[Title omitted]

DECREE—Filed Oct. 22, 1921

At a Session of said Court Held at the Court-house, in the City of Detroit, in said County, on the 22nd Day of October, 1921.

Present: Honorable Arthur Webster, Circuit Judge.

This cause came on to be heard upon the pleadings and proofs taken therein, and having been argued, and briefs having been filed by counsel for the respective parties, and the court having had the same under advisement:

Now, therefore, upon due consideration thereof, it is ordered, adjudged and decreed, and the court now here doth order, adjudge and decree, that the plaintiff's bill of complaint be, and the same is hereby dismissed, and that the said defendants recover of and from the plaintiff their costs to be taxed, and that the said defendants have execution thereof.

Arthur Webster, Circuit Judge.

[fol. 118] IN THE CIRCUIT COURT FOR COUNTY OF WAYNE

[Title omitted]

CLAIM OF APPEAL—Filed Nov. 10, 1921

To the Clerk of said Court:

Now comes the above named plaintiff and hereby claims the benefit of an appeal to the Supreme Court of this state from the decree made and rendered in this cause by the above entitled court on October 22nd, 1921.

Cohane, Rhodes, Garvett & Frankel, Attorneys for Plaintiff.

Dated Detroit, Michigan, November 10th, 1921.

[fol. 119] IN THE CIRCUIT COURT FOR COUNTY OF WAYNE

[Title omitted]

STIPULATION AND ORDER EXTENDING TIME—Filed April 6, 1922

It is hereby stipulated by and between the parties hereto by their respective counsel, that the time within which to perfect the appeal of plaintiff in the above entitled cause to the Supreme Court of this state may be extended to April 12th, 1922.

Cohane, Rhodes, Garvett & Frankel, Attorneys for Plaintiff.

Elmer H. Groefsema, Attorney for Defendants.

[fol. 120] Order Extending Time, etc.

At a Session of said Court Held in Its Court-room, at Detroit, Michigan, in the Wayne County Building, on April 5, 1922

Honorable Arthur Webster presiding.

On reading the annexed stipulation, it is hereby ordered that the time within which plaintiff herein may perfect his appeal to the Supreme Court of this state in the above entitled cause, may be and the same hereby is extended until April 12th, 1922.

Arthur Webster, Circuit Judge.

A true copy. H. E. Torpel, Deputy Clerk.

Plaintiff's Exhibits

EXHIBIT 1

Warranty Deed dated May 16th, 1917, recorded in the Wayne County Register of Deeds' Office May 18th, 1917, in Liber 1197 of

Deeds, page 379, from Eddie A. Hulett and Nellie E. Hulett, his wife, to Harry P. Poston of Detroit, Michigan, conveying lots No. 32, 35, 37, 39, 41, 43, 45, 47 in Sunnyside Subdivision part of quarter section one (1), 10,000 acre tract (Hamtramck) according to the plat thereof recorded December 31, 1892, in Liber 18, page 2 of [fol. 121] Plats, Wayne County Records.

Said premises being situated on the east side of McDougall Avenue, between Davison and Edward Avenues.

(This conveyance is made to correct error in spelling of second party's name in Deed dated February 20, 1917, and recorded in Liber 1154, page 507 of Deeds, on March 2, 1917.)

The Warranty is against all lawful claims whatsoever "Excepting a real estate mortgage in the sum of \$200.00 on each lot or parcel of land aforesaid, which the second party hereby assumes and agrees to pay."

EXHIBIT 2

See Defendants' Exhibit C, pages 139-143.

PLAINTIFF'S EXHIBIT 3

Official Honorable Discharge from the Army of the United States of America of Harry P. Poston, First Lieutenant, Medical Corps, at Headquarters, Port of Embarkation, Hoboken, New Jersey, dated May 14th, 1919, showing service in the Army from September 29th, 1918, to May 14th, 1919.

"Remarks: Services no longer required; termination of the emergency."

[fol. 122]

PLAINTIFF'S EXHIBIT 4

Liberal Loans on Real Estate; Land Contracts Bought & Sold; Construction Loans

Member Detroit & National Real Estate Board

Edmund L. Ebert, Real Estate Broker, 309 Majestic Building, Detroit

Phone: Main 1458

September 1, 1917.

Dr. H. P. Poston, City.

DEAR DOCTOR: Mortgage given by Eddie A. Hulett to Andrew J. Keary on lots located on McDougall near Davison amounting to \$3,800 and interest of \$114 will be due Sept. 25.

Yours very truly, E. L. Ebert.

[fol. 123]

PLAINTIFF'S EXHIBIT 5

Certified Check

The Dime Savings Bank

No. —.

Detroit, Michigan, Nov. 19, 1919.

Pay to the order of Dr. H. P. Poston \$1,735.93/100 one thousand,
seven hundred thirty-five 93/100 dollars.

Broadway-Park Branch.

H. P. Poston.

Endorsement reverse side hereof: Pay to the order of Andrew J.
Keary and Ella R. Keary, husband and wife. Dr. H. P. Poston,
H. P. Poston.

[fol. 124]

PLAINTIFF'S EXHIBIT 6

Certified Check

The Dime Savings Bank

No. 246.

Detroit, Michigan, Jan. 13, 1920.

Pay to the order of himself (H. P. Poston) \$1,850.00/100 eighteen
hundred fifty no/100 dollars.

Broadway-Park Branch.

H. P. Poston.

Endorsement reverse side hereof: Himself, H. P. Poston.

PLAINTIFF'S EXHIBIT 7

Quit Claim Deed Harry P. Poston of Detroit to Albert E. Cather-
wood of Detroit, dated December 16, 1919, conveying lots 32, 35,
37, 39, 41, 43, 45, being the same property described in Exhibit 1.

The following appears in the body of said Deed:

"Hereby there is conveyed the right and interest of first party to
redeem the property aforesaid as conveyed by Sheriff's Deed dated
February 6, 1918, recorded February 7, 1918, in Liber 1032 of
Deeds, on page 526 in the Office of the Register of Deeds for Wayne
County, Michigan, said right to redemption still subsisting in said
first party by reason of his having been in the military service during
the time when otherwise his right to redemption would have been
[fol. 125] foreclosed by the lapse of time."

Recorded December 17, 1919, at 8.30 A. M. in the Wayne County
Register of Deeds' Office in Liber 1329 of Deeds on page 563.

PLAINTIFF'S EXHIBIT 8

Quit Claim Deed from Albert E. Catherwood, a single man, to Harry P. Poston, dated December 17th, 1919, wherein it is stated:

"It is hereby conveyed to second party by first party all of his right, title, interest, claim and demand in and to said property by virtue of deed of second party to first party under date of December 16, 1919.

PLAINTIFF'S EXHIBIT 9

Receipt of the Detroit City Treasurer's Office for 1919 City Taxes to Harry P. Poston, showing payment on August 6th, 1919, for taxes on lots 32, 35, 37, 39, 41, 43, 45, giving their assessed valuation at \$330.00 each showing a tax of \$6.12 on each lot and making a total payment of \$42.84.

PLAINTIFF'S EXHIBIT 10

Receipt of the Detroit City Treasurer's Office for 1918 Taxes to Harry P. Poston, showing payment on August 6th, 1919, for taxes on lots 32, 35, 37, 39, 41, 43, 45, showing a tax of \$7.02 on each lot and making a total payment of \$49.14.

[fol. 126]

PLAINTIFF'S EXHIBIT 11

Detroit, July 24th, 1919.

Mr. Louis Cohane, Attorney, 705 Free Press Bldg.

DEAR SIR: Below please find figures showing amount due on lots 32, 35, 37, 39, 41, 43, 45 and 47 Sunnyside Subdivision, Mortgaged Sept. 25/16 by Eddie E. Hulett and wife.

Interest is computed to Aug. 5, 1919, but deduction can be made should payment be made before that date.

Yours truly, (Signed) A. J. Keary.

Nov. 8, 1917. Principal	\$1,661.37
Interest	28.02
Sheriff	3.00
Register Deeds	2.50
Tax Stamp	2.00
Legal News	24.75
Attorney	35.00
<hr/>	
Due Feb. 5/18	\$1,756.64
Int. to Feb. 5/19	122.96
<hr/>	
	\$1,879.60
Int. to Aug. 5/19	65.79
<hr/>	
Due Aug. 5, 1919	\$1,945.39

[fol. 127] PLAINTIFF'S EXHIBIT 12

Copy of Envelope

(Detroit, July 24, 5 P. M., 1919, Mich. U. S. Postage, 2 cents.)
 Addressed: Mr. Louis Cohane, 705 Free Press Building, City. Return address reverse side: A. J. Keary, 309 Majestic Bldg., Detroit, Mich.

[fol. 128] PLAINTIFF'S EXHIBIT 13

Louis Cohane Attorney and Counselor, 705 Free Press Bldg., Detroit

Telephone Main 813

April 12, 1919.

Major Kerns, Port of Embarkation, Hoboken, New Jersey.

In re Lieut. Harry P. Poston (M. D.), Appl. for Discharge

DEAR SIR: In the above matter, as an attorney familiar with the personal affairs of Dr. Poston, permit me to advise you, of my own personal knowledge, that for approximately one year previous to his enlistment, Dr. Poston was endeavoring to arrange his personal and financial affairs so as to enable him to enter the service without undue hardship, considering his wife and child.

The sacrifices the doctor made were because of the emergency facing the United States. With peace practically at hand, I trust that it will be possible to return Dr. Poston to civil life so as to enable him to care for his wife and child, instead of their being recipients of assistance from relatives. In addition, Dr. Poston carries heavy life insurance contracts, the premiums for which are a drain on his financial resources; and when he left Detroit, had

built up a splendid medical practice. These sacrifices, becoming [fol. 129] more acute from day to day, it would seem should no longer be required from him, in view of the passage of the acute emergency for the Government. You appreciate that an extended absence from his practice will make it much more difficult for him to rehabilitate himself.

I have had occasion from time to time to make investigations along the foregoing lines, and if my recommendation as Legal Aid to Red Cross and Alternate Director of Legal Advisory Board for Draft Board No. 6 carries any weight, I am glad to make my recommendation and the foregoing statements in behalf of Dr. Poston's discharge in those capacities.

I trust to hear from you, and am,

Very truly, (Signed) Louis Cohane. LC/MS.

PLAINTIFF'S EXHIBIT 14

Evacuation Office, Office of the Surgeon, Port of Embarkation,
Hoboken, N. J.

April 15, 1919.

Mr. Louis Cohane, 705 Free Press Bldg., Detroit, Michigan.

DEAR SIR: Replying to your letter of April 12th, in regard to Lieut. Harry E. Poston, M. C., I may say that endeavor is being made to replace at an early date all officers who desire discharge and who are urgently needed at home.

[fol. 130] As soon as Lieut. Poston can be released without injustice to others, his discharge will be recommended.

Very truly yours, (Signed) H. N. Kerns, H. N. Kerns, Major,
Medical Corps. HNK/fg.

Defendants' Exhibits

DEFENDANTS' EXHIBIT A

Sheriff's Deed on Mortgage Sale

This indenture made the fifth day of February, in the year of our Lord one thousand nine hundred and eighteen, between Otto C. Klanowsky, deputy sheriff in and for the County of Wayne, in the State of Michigan, of the first part, and Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan.

Witneseth, that whereas Eddie A. Hulett and Nellie E. Hulett, his wife, of the City of Detroit, Wayne County, Michigan, made a certain indenture of mortgage to Andrew J. Keary and Ella R. Keary, his wife, of the Village of New Hudson, Oakland County, Michigan,

dated the twenty-fifth day of September, A. D. 1916, which mortgage was duly recorded in the office of the register of deeds in and for the County of Wayne, State of Michigan, in liber 795 of mortgages, on page 506, on September 27, 1916, which said indenture of mortgage contained a power of sale, which has become operative by reason of a default in a condition of said mortgage.

[fol. 131] And whereas, by virtue of said power of sale, and in pursuance of the statute in such case made and provided (no proceedings at law having been instituted to recover the debt secured by said mortgage or any part thereof), a notice was duly published that the said premises in said indenture of mortgage described or so much thereof as might be necessary to pay the amount due upon said mortgage, interest, all legal costs, would be sold on the fifth day of February, in the year of our Lord one thousand nine hundred and eighteen, at twelve o'clock noon, Eastern Standard Time, at the southerly or Congress street entrance to the Wayne County Building in the City of Detroit, Wayne County, Michigan, that being the place of holding the circuit court within said county in which the premises described in said mortgage are situated.

And whereas, in pursuance of said notice, I did, on the fifth day of February, in the year last aforesaid, at twelve o'clock noon (Eastern Standard Time) of said day, expose for sale at public vendue, the lands and tenements hereinafter particularly described, and on such sale did strike off and sell the said lands and tenements to Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, for the sum of one thousand seven hundred fifty-six and 64/100 (\$1,756.64), that being the highest bid therefor, and the said Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, being the highest bidders; which said lands and tenements are described as follows, viz.: Premises situated in the Township of Hamtramck, in the County of Wayne and State of Michigan, described as follows, to-wit:

[fol. 132] Lots numbered thirty-two (32), thirty-five (35), thirty-seven (37), thirty-nine (39), forty-one (41), forty-three (43), forty-five (45) and forty-seven (47), all in Sunnyside Subdivision of part of quarter section 1, 10,000 acre tract, Hamtramck, according to the plat thereof as recorded December 31, 1892, in liber 18, page 2 of plats, Wayne County Records. (Said above described lots were offered for sale in separate parcels and as such were sold by me for the sums of two hundred nineteen and 58/100 (\$219.58) dollars, each respectively, aggregating in all the aforesaid sum of one thousand seven hundred fifty-six and 64/100 dollars.)

Now this indenture witnesseth, that I, Otto C. Klanowsky, deputy sheriff aforesaid, by virtue and in pursuance of the statute in such case made and provided, and in consideration of the said sum of money so paid as aforesaid, have granted, conveyed, bargained and sold, and by this deed do grant, convey, bargain and sell unto the said Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, their heirs and assigns, forever, all the said lands and tenements hereinabove

described, with the appurtenances, and all the estate, right, title and interest which the said mortgagors had in the said lands and tenements, and every part thereof, on the twenty-fifth day of September, in the year of our Lord one thousand nine hundred and sixteen, that being the date of said mortgage, or at any time thereafter.

To have and to hold the said lands and tenements, and every part thereof, to the said Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, [fol. 133] their heirs and assigns, forever, to their sole and only use, benefit and behoof forever, as fully and absolutely as I, Otto C. Klanowsky, deputy sheriff aforesaid, under the authority aforesaid, might, could or ought to sell the same.

In witness whereof, I have hereunto set my hand and seal the day and year first above written.

..... Otto C. Klanowsky (Seal), Deputy Sheriff in and for the
County of Wayne, Mich. Signed, sealed and delivered in
presence of: Arthur Hitchins, Robert W. Webb.

STATE OF MICHIGAN,
County of Wayne, ss:

On the fifth day of February, one thousand nine hundred and eighteen, before me, a notary public in and for said county, came Otto C. Klanowsky, deputy sheriff of said county, known to me to be the person described in and who executed the above conveyance, and acknowledged that he executed the same for the intents and purposes therein named.

(Signed) Robert W. Webb, Notary Public, Wayne County,
Mich. My Commission expires June 26, 1921.

[fol. 134]

Evidence of Sale

Eddie A. Hulett et al.

STATE OF MICHIGAN,
County of Wayne, ss:

Nelson L. Korte, being duly sworn, deposes and says the annexed printed copy of a notice was taken from the Detroit Legal News, a newspaper printed and circulated in said state and county, and that said notice was published in said newspaper on the 10th, 17th and 24th of November, 1st, 8th, 15th, 22nd and 29th of December, 1917, 5th, 12th, 19th and 26th of January and 2nd of February, A. D. 1918; that he is the principal clerk of the printers of said newspaper and knows well the facts stated herein.

(Signed) Nelson L. Korte.

Subscribed and sworn to before me this 2nd day of February,
A. D. 1918. H. A. Wright, Notary Public, Wayne County,
Mich. My Commission expires July 30, 1920.

[fol. 135]

Printed Copy of Notice

"S. R. Smith, Attorney, 309 Majestic Bldg.

Mortgage Foreclosure

Whereas default has been made in the conditions of a certain mortgage made by Eddie A. Hulett and Nellie E. Hulett, his wife, of the City of Detroit, Wayne County, Michigan, to Andrew J. Keary and Ella R. Keary, his wife, of the Village of New Hudson, Oakland County, Michigan, dated the twenty-fifth day of September, A. D. 1916, and recorded in the office of the Register of Deeds for Wayne County, Michigan, on September 27, A. D. 1916, in liber 795 of mortgages on page 506, on which mortgage there is claimed to be due at the date of this notice the sum of one thousand six hundred sixty-one and 37/100 (\$1,661.37) dollars, principal and interest, and more than thirty days' default having been made in the payment of the principal and interest, which became due and payable on September 25, 1917; and no suit or proceeding at law or in equity having been instituted to recover the money secured by said mortgage or any part thereof; now, therefore, by virtue of the power of sale contained in said mortgage and of the statute in such case made and provided, notice is hereby given that on Tuesday, the fifth day of February, A. D. 1918, at twelve o'clock, noon, Eastern Standard Time, the undersigned will, at the southerly or Congress street entrance to the Wayne County Building in the City of Detroit, Wayne County, Michigan (that being the place where the Circuit Court for the County of Wayne, Michigan, is held), sell at public auction, [fol. 136] to the highest bidder, the premises described in said mortgage or so much thereof as may be necessary to pay the amount due, as aforesaid, upon said mortgage, with seven (7) per cent interest, and all legal costs and charges provided in said mortgage and allowed by law, including an attorney fee, the premises situated in the Township of Hamtramck, in the County of Wayne and State of Michigan, described as follows, to-wit: Lots numbered thirty-two (32), thirty-five (35), thirty-seven (37), thirty-nine (39), forty-one (41), forty-three (43), forty-five (45), and forty-seven (47), all in Sunnyside subdivision of part of quarter section 1, 10,000 acre tract, Hamtramck, according to the plat thereof as recorded December 31, 1892, in liber 18, page 2 of plats, Wayne County Records.

Dated at Detroit, Michigan, November 8th, A. D. 1917.

Andrew J. Keary, Ella R. Keary, Mortgagees. S. R. Smith,
Attorney for Mortgagees, 309 Majestic Bldg., Detroit, Mich-
igan."

Printer's Bill

5 folios 13 times.....	\$24.50
Affidavit for Publication.....	.25

 \$24.75

Received Payment: Detroit Legal News.

[fol. 137] STATE OF MICHIGAN,
County of Wayne, ss:

Otto C. Klanowsky, being duly sworn, deposes and says that he is deputy sheriff of said County of Wayne, State of Michigan, that he acted as auctioneer and made the sale as described in the annexed deed pursuant to the foregoing printed notice; that the sale was opened at twelve o'clock noon (Eastern Standard Time) of the fifth day of February, A. D. 1918, at the southerly or Congress street entrance to the Wayne County Building, Detroit, Michigan, that being the place of holding the circuit court in the said County of Wayne, State of Michigan, and was kept open for the space of one (1) hour; that the highest bid for said lands and tenements was the sum of one thousand seven hundred fifty-six and 64/100 dollars, made by Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, and that the sale was in all respects open and fair, and that this deponent did strike off and sell the said lands and premises to the said Andrew J. Keary and Ella R. Keary, husband and wife, of the Village of New Hudson, Oakland County, Michigan, who purchased the said premises fairly, and in good faith, as deponent verily believes.

(Signed) Otto C. Klanowsky.

Subscribed and sworn to before me this 5th day of February, A. D. 1918. Robert W. Webb, Notary Public, Wayne County, Mich. My commission expires June 26, 1921.

[fol. 138] STATE OF MICHIGAN,
County of Wayne, ss:

I do hereby certify that the within mortgage deed will become operative at the expiration of one year from the fifth day of February, A. D. 1918, unless otherwise redeemed according to law in such case made and provided.

(Signed) Otto C. Klanowsky, Deputy Sheriff.

Sheriff's Office No. 41123—Received Feb. 6th, Sheriff's Deed on Mortgage Sale, 432,549, Eddie A. Hulett, Et Ux., by Deputy Sheriff, to Andrew J. Keary, Et Ux., Register's Office, Wayne County, ss. Received for record this 7th day of February, A. D. 1918, at 8:30 o'clock A. M. and recorded in Liber 1032 of deeds, on page 526. Paid \$2.50.

(Signed) Otto Stoll.

DEFENDANT'S EXHIBIT B.

Receipt of the City Treasurer to "Andrew J. Karey, Address 309 Majestic Building" for the sum of Two Hundred Ninety-six Dollars

Eighty Cents (\$296.80), showing payment on January 30th, 1920, of a "special assessment" on Lots 32, 35, 37, 39, 41, 43, 45 and 47, of \$37.10 on each lot.

[fol. 139]

DEFENDANT'S EXHIBIT C

Mortgage

This mortgage, made the twenty-fifth day of September in the year one thousand nine hundred and sixteen.

Witnesseth, that Eddie A. Hulett and Nellie E. Hulett, his wife, of the City of Detroit, Wayne County, Michigan, mortgagors, mortgage and warrant to Andrew J. Keary and Ella R. Keary, his wife, of the Village of New Hudson, Oakland County, Michigan, mortgagees, their heirs and assigns, the parcels of land, situated in the Township of Mamtramck in the County of Wayne and State of Michigan, described as follows, to-wit: Lots (30, 31, 32, 33, 34, 35, 36, 37, 38 and 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49) thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine, in Sunnyside Subdivision of part of quarter section 1, 10,000 Acre Tract, Hamtramck, according to the plat thereof as recorded December 31, 1892, in liber 18, page 2 of plats, Wayne County Records.

Together with the hereditaments and appurtenances thereof, to secure the payment of the principal sum of Four Thousand Dollars (\$4,000) payable on or before one year from date hereof and interest thereon from date at the rate of 6% per annum, payable semi-annually, until the full payment of said principal sum, according to the terms of a certain note bearing even date herewith, executed [fol. 140] by Eddie A. Hulett and Nellie E. Hulett, his wife, to said mortgagees; and will pay interest at the rate of seven per cent per annum, semi-annually, upon all overdue interest and principal from the time of its or their maturity.

And it is hereby expressly agreed, by and between the parties hereto, as a part hereof:

1st. That said mortgagors within thirty days from the time the same become due and payable, will pay all taxes and assessments which shall be levied or placed upon the said land.

2nd. That said mortgagors will, while the mortgage debt remains unpaid, keep all buildings upon the mortgaged premises insured against loss and damage by fire, by insurers, and in amount approved by mortgagees, with the insurance money, in case of loss, made payable in the policy thereof to the mortgagees, or their assigns as their mortgage interest may appear, and deliver as issued, to the mortgagees, to be kept by them all policies of such insurance, and pay, on their issue, the premium for the same.

3rd. That if the mortgagors make default in the payment of any of the aforesaid taxes, or assessments, or premiums as above covenanted and agreed, said mortgagees, or holder of the mortgage may pay the same, and that the sum or sums so paid shall, from the time of their payment, be due and payable hereon as part of the mortgage debt, with interest thereon at the rate of six (6) per cent per annum.

4. That should default be made in the payment of any installment of principal maturing hereon, before the whole thereof becomes [fol. 141] due, or of any installment of interest when the same becomes due and payable, or of any taxes or assessments or premiums for insurance, or any part thereof, when the same are payable as above provided, and should the same or any part thereof remain unpaid for the period of thirty days, then and from thenceforth, the aforesaid principal sum, with all arrearages of interest, shall at the option of said mortgagees, their legal representatives, or assigns, become due and be payable therefrom and thereafter although the period above limited for the payment of the same shall not then have expired, anything hereinbefore, or in said note contained to the contrary thereof in anywise notwithstanding.

5th. That upon default being made in the payment of principal or interest hereon, or of any part thereof, at the time the same becomes due or payable according to the terms hereof, the said mortgagees, their legal representatives or assigns, are hereby authorized and empowered to grant, bargain and sell, release and convey the said premises, property and appurtenances at public vendue and to execute and deliver to the purchaser or purchasers at such sale good and sufficient deeds of conveyance in law, pursuant to the statute in such case made and provided, rendering any surplus moneys after payment of the moneys due hereon, the attorney fee provided by law, and the costs and charges of such vendue and sale, to the said mortgagor-, their heirs, legal representatives or assigns.

If not in default on the mortgage, parties of the second part agree to release any one lot upon the payment to them of Two Hundred (\$200.00) dollars and interest.

[fol. 142] In witness whereof, the said mortgagors have hereunto set their hands and seals the day and year first above written.

Eddie A. Hulett, Nellie E. Hulett. Signed, sealed and delivered in presence of: Edward E. Hill, Edmund L. Ebert.

STATE OF MICHIGAN,
County of Wayne, ss:

Before me, the subscriber, a Notary Public, in and for said county, this 25th day of September, A. D. 1916, personally appeared Eddie A. Hulett and Nellie E. Hulett, his wife, known to me to be the persons described in, and who executed the within mortgage, and

severally acknowledged the execution thereof to be their free act and deed.

Edmund L. Ebert, Notary Public, Wayne County, Mich.
My commission as Notary Public expires on the 19th day
of Sept., 1919.

WAYNE COUNTY, ss:

Register's Office

Received for record the 27th day of September, 1916, at 9:30
o'clock A. M. and recorded in 795 of mortgages on page 506.

(Signed) Otto Stoll, Register.

[fol. 143] Mortgage Tax Certificate

No. 61475

Section 3, Act No. 91, P. A. 1911

Wayne County Treasurer

STATE OF MICHIGAN,
County of Wayne, ss:

Sept. 27, 1916.

I hereby certify that the amount secured by this mortgage is
Four Thousand Dollars and that I have received Twenty Dollars in
full for the tax thereon.

Edward F. Stein, per J. W., County Treasurer of Wayne
County, Mich.

Book 14, page 28.

DEFENDANT'S EXHIBIT D

Receipt of the Wayne County Treasurer's Office showing pay-
ment by A. J. Keary on December 31st, 1919, of the sum of Eight
and 86/100 (\$8.86) Dollars for delinquent taxes for 1918 on lots
32, 35, 37, 39, 41, 43, 45.

[fol. 144] DEFENDANT'S EXHIBIT E

War Department, the Adjutant General's Office, Washington

Statement of the Military Service of Harry P. Poston

The records of this office show that Harry P. Poston, born No-
vember 6, 1884, at Bonne Terre, Mo., was appointed First Lieu-
tenant, Medical Corps, September 24, 1918, and reported to the Com-
mandant, Medical Officers Training Camp, Camp Greenleaf, Ga.,

for a course of instruction. He was assigned to duty at Hoboken, N. J., and honorably discharged from the service of the United States May 14, 1919, for the convenience of the Government, his services being no longer required. He gave as an address for future reference, 1337-49 David Whitney Building, Detroit, Michigan.

Official statement furnished to Hon. Frank E. Doremus, House of Representatives, March 16, 1920.

By authority of the Secretary of War.

(Sgd.) F. S. Brown, Adjutant General. (Seal.)

The Adjutant General's Office (Official), War Department.

[fol. 145] DEFENDANT'S EXHIBIT F

War Department, the Adjutant General's Office, Washington

In reply refer to 201 (Poston, Harry P.) WW. mvb/217.

March 16, 1920.

Hon. Frank E. Doremus, House of Representatives.

DEAR SIR: In reply to your letter of the 13th instant, in which you inclose one from Mr. Edmund L. Ebert of Detroit, Michigan, herewith returned, relative to a record of the military service of Dr. Harry P. Poston, formerly First Lieutenant, Medical Department, U. S. A., I have the honor to inclose herewith a Statement of Service in the case of the above named former officer, prepared in accordance with the records on file in this office.

Very respectfully, (Sgd.) P. C. Harris, the Adjutant General, per R. R. C.

2 incl. Letter. Statement of Service.

[fol. 146] DEFENDANT'S EXHIBIT G

Warranty Deed

This indenture, made this eighteenth day of December in the year of our Lord one thousand nine hundred and nineteen, between Andrew J. Keary and Ella R. Keary, his wife, of the Village of New Hudson, County of Oakland, State of Michigan, of the first part, and Edmund L. Ebert of the City of Detroit, County of Wayne, State of Michigan, of the second part.

Witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar and other valuable considerations, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, do by

these presents, grant, bargain, sell, remise, release, alien and confirm unto the said party of the second part and his heirs and assigns, forever all those certain pieces or parcels of land situated and being in the City of Detroit, County of Wayne and State of Michigan, and described as follows, to-wit:

Lots numbered thirty-two (32), thirty-five (35), thirty-seven (37), thirty-nine (39), forty-one (41), forty-three (43), forty-five (45) and forty-seven (47), all in Sunnyside Subdivision of east sixty (60) acres of the west eighty (80) acres of quarter section one (1) Ten Thousand Acre Tract, Hamtramck, now City of Detroit, as recorded December 31st, 1892, in Liber 18 on page 2 of plats, Wayne County Records.

[fol. 147] Together with all and singular the hereditaments and appurtenances thereto belonging or in anyways appertaining: To have and to hold the said premises, as above described, with the appurtenances unto the said party of the second part, and to his heirs and assigns forever, and the said Andrew J. Keary and Ella R. Keary his wife, parties of the first part, their heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensembling and delivery of these presents they are well seized of the above granted premises in fee simple; that they are free from all incumbrances whatever and that they will, and their heirs, executors and administrators shall warrant and defend the same against all lawful claims whatsoever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Andrew J. Keary, Ella R. Keary. Signed and delivered in presence of: Louis L. Ebert, N. H. Choate.

STATE OF MICHIGAN,
County of Wayne, ss:

On this eighteenth day of December in the year one thousand nine hundred and nineteen, before me, Notary Public in and for said county, personally appeared Andrew J. Keary and Ella R. Keary, [fol. 148] his wife, to me known to be the same persons described in and who executed the within instrument, who severally acknowledged the same to be their own free act and deed.

(Signed) Norman H. Choate, Notary Public, Wayne County, Mich. My commission expires March 29th, 1924.

WAYNE COUNTY, ss:

Register of Deeds Office

This instrument was received for record this 26th day of April, 1920, at 3:30 o'clock P. M., and recorded in Liber 1414 of Deeds, on page 265 as a proper certificate was furnished in compliance with Sec. 135, of Senate Bill No. 199, File 212, Act of 1893.

(Signed) Otto Stoll, Register of Deeds.

[fol. 149]

SUPREME COURT OF MICHIGAN

[Title omitted]

This cause is duly submitted on briefs by stipulation of counsel.

[fol. 150]

[Title omitted]

In this cause an opinion is filed, in accordance with which a decree will be hereafter entered.

[fol. 151] STATE OF MICHIGAN:

SUPREME COURT

[Title omitted]

Before the Entire Bench

OPINION—Filed December 29, 1922

CLARK, J.: Plaintiff by deed became the owner of 8 lots in Detroit. The deed was subject to "a real estate mortgage in the sum of \$200.00 on each lot or parcel of land aforesaid which the second party hereby assumes and agrees to pay." The mortgagees were Andrew J. Keary and Ella R. Keary, defendants. The mortgage contained a power of sale. Under the provisions of Chap. 249, Comp. Laws 1915, relating to foreclosure of mortgages by advertisement the premises were sold February 5, 1918, to the mortgagees. The sheriff made and executed a deed and delivered it to the Register of Deeds pursuant to the statute. At the expiration of one year, the period of redemption, the premises not having been redeemed, the Register delivered the deed to the purchasers as the law directs.

On March 8, 1919, the Soldiers and Sailors Civil Relief Act was [fol. 152] approved by the President. Section 3078 $\frac{1}{4}$ a et seq. Comp. St. Ann. Supp. 1919.

On September 29, 1918, plaintiff entered the military service of the United States, and on May 4, 1919, he was honorably discharged. He filed a bill to redeem from the foreclosure having tendered the amount due. His bill was dismissed. He has appealed.

In measuring the period of redemption from foreclosure by advertisement should the period of military service be excluded?

We quote three sections of the Act:

Section 100. "That for the purpose of enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of

the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war."

Section 205. "That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."

Section 302. (1) "That the provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of non-payment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

(a) Stay the proceedings as provided in this Act; or

(b) Make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court."

In dismissing the bill Judge Webster said:

"An examination of the Soldiers and Sailors Civil Relief Act has satisfied me that (whether designedly or through oversight) it has failed to cover the case of a statutory redemption period which began to run before the passage of the Act. This being true, plaintiff's right to redeem expired February 5th, 1919, * * *"

His opinion is fully supported by *Taylor v. McGregor State Bank*, 174 N. W. 893 (Minn.) where it was held, quoting from syllabus:

"The act * * * has no application to the nonjudicial proceeding for the foreclosure of a real estate mortgage by advertisement, as authorized by our statutes, which was fully completed by a sale of the mortgaged property prior to the commencement of the military service of soldier affected, though the period of redemption had not then expired."

And citing the above case a majority of the court held in *Wood v. Vogel*, 87 So. 174 (Ala.) quoting from syllabus:

"The right of redemption given by Code 1907, section 5746 et seq., from judicial and quasi judicial sales is a mere personal privilege, and must be exercised within the two years prescribed; hence the Soldiers' and Sailors' Relief Act (U. S. Com. St. 1918, Comp. St. Ann. Supp. 1919, section 3078 $\frac{1}{4}$ e), declaring that the period of military service shall not be included in computing any period of limitation, does not apply so as to extend the time within which the right of redemption may be exercised."

The Act does not in precise terms refer to a limitation or foreclosure such as this. If the Act must be strictly construed the opinion of the trial judge and the cases cited are right. But we think the Act should be construed liberally to accomplish the congressional purpose indicated in the section quoted. Of a somewhat similar statute it was said in *Stewart v. Kahn*, 11 Wall. 493:

[fol. 154] "A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the lawmaker constitutes the law. The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment."

We quote from *Ozawa v. United States* (U. S. Sup. Ct. decided Nov. 13, 1922):

"It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.] See *Church of the Holy Trinity v. United States*, 143 U. S. 457; *Heydenfeldt v. Daney Gold, etc. Co.*, 93 U. S. 634, 638."

Of the Act it was said in *Steinfeld v. Mass. Bond and Ins. Co.*, 112 Atl. 800 (N. H.):

"It was not the legislative intent that the remedial purpose of the act should be defeated by a narrow or technical construction of the language used. *Halle v. Cavanaugh*, 111 Atl. 76."

And see *Clark v. Mechanics' Am. Natl. Bank*, 282 Fed. 589. The provision of our statute limiting the right of redemption from this foreclosure of mortgage to one year is not strictly a limitation of action. But relative to like limitations in analogous cases the Act has been construed liberally and, we think, rightly.

In *Kuehn v. Neugebauer*, 216 S. W. 259 (Tex.) it was said:

"On April 25, 1918, this cause was reversed and was remanded to the district court of Hays county for a new trial. 204 S. W. 369. No motion for rehearing was ever filed. A few days prior to August 30, 1919, the appellee paid the costs of the appeal, and requested the clerk of this court to issue a mandate to the trial court, in order that he might proceed with the prosecution of the cause, which request was refused by the clerk, upon the ground that the costs had not been paid within one year from the date of the judgment of this court, as required by article 1559, Revised Statutes."

and held, quoting from syllabus:

[fol. 155] "Soldiers' and Sailors' Civil Relief Act * * * authorizes the appellate court to grant a motion of an appellee, requesting it to instruct the clerk to issue a mandate, although costs had not been paid within one year from the reversal of a judgment in favor of appellee, it appearing that appellee entered the military service of the United States, before he became aware of reversal of his judgment, and served overseas until within three months of filing his motion, notwithstanding Rev. St. 1911, art. 1559, which leaves the appellate court without discretion to order the issuance of the mandate when costs are not paid within the year."

and also said:

"The writer thinks it is proper to add that he is of the opinion that article 3078 $\frac{1}{4}$ e, relating to limitations of actions, is also applicable to this case, and that the time limited by article 1559 for the payment of costs of an appeal and the taking out of a mandate did not run against appellee during the period of his military service. It is appreciated that this case probably does not fall within the strict letter of the last-named section, (205) and that it would be giving it a very liberal construction to hold it applicable here. However, in view of the broad purposes of the act expressed in the first section and the remedial nature of every provision in it, it is believed by the writer that the subject-matter of this motion falls within the spirit of article 3078 $\frac{1}{4}$ e, without further elaboration of the question."

In *Halle v. Cavanaugh*, 111 Atl. 76 (N. H.) there was motion to abate an action. The plaintiff died in the May term. The second term thereafter was the January term. The statute of that state provided that the administrator had two full terms in which to appear and assume prosecution of the suit. No one appearing the motion to abate was granted. The plaintiff's husband was the executor of her will. He had been drafted into the military service of the United States. That fact was relied upon under the act to toll the statute. The court said:

"The question here is whether this right to appear and prosecute a pending suit, which would abate but for such appearance, is covered by the federal statute, which in terms applies to "The bringing of any action." There is no other provision in the federal act which

would afford any relief to the person so situated. The general purpose of that statute is declared to be to extend protection to persons in the military service to prevent prejudice or injury to their civil rights during their term of service. *Id.* section 100. In view of this declared object, it is reasonable to conclude that the intent was to [fol. 156] include the procedure here involved. It follows that the husband had two full terms of court after the death of his wife, and exclusive of the time he was in the service in which to appear as an individual and assume the prosecution of this suit."

also

"The purpose of this act was the protection of persons in the military service of the United States, to prevent prejudice to their civil rights during their term of service by making provision for the *temporary suspension of legal proceedings and transactions relating thereto.*" (Italics supplied.)

In the Steinfield case the action was assumpsit on a policy of indemnity insurance. The policy provided that suit must be brought within 90 days after payment of loss. The suit was brought about 5 months after such payment but during this period plaintiff was in the military service. The section of the statute relied upon was section 205 above quoted. Defendant contended that the time for bringing suit was limited by the contract and not by "any law" and that therefore the statute did not apply.

It was held:

"The application of the federal act is not limited to statutory provisions. It applies to all law, and provides, in substance, that notwithstanding the state law limits the action as by contract agreed, that law shall not apply while the plaintiff is in the service."

And for instructive cases relative to the act see: *Hoffman v. Charlestown Five Cents Sav. Bank*, 121 N. E. 15; *Morse v. Stober*, 123 N. E. 780; *John Hancock Mut. Life Ins. Co. v. Lester*, 125 N. E. 594; *Olson v. Gowan Lenning Brown Co.*, 182 N. W. 929; *Studt v. Trueblood*, 181 N. W. 445; *Pierrard v. Hoch*, 191 Pac. 328; *Great Barrington Sav. Bank v. Brown*, 132 N. E. 398; *Erickson v. Macy*, 131 N. E. 744; *Hickernell v. Gregory*, 224 S. W. 691; *Austby v. Yellowstone Valley Mtg. Co.*, 207 Pac. 631; *Lewis v. Anthony Rep. Pub. Co.*, 208 Pac. 254; *Konkel v. State*, 170 N. W. 715, and 16 A. L. R. p. 1327; 9 A. L. R. p. 1 and p. 78. And the statutes of the state [fol. 157] must yield to the act. *Konkel v. State*, *supra*.

Had the foreclosure been in chancery, section 12676 et seq. Comp. Laws 1915, and had plaintiff's induction into the service occurred during the period of redemption there limited, the court, as was said in the Kuehn case, might have and doubtless would have entered an order staying the execution of its decree upon proper application or upon its own motion upon being apprised of requisite facts. No reason appears why the act should be applied to a chancery foreclosure and not to a foreclosure by advertisement. And we think

the act should be held to apply to the statutory limitation for redemption in the case at bar. The protection of those in the service by the suspension of legal proceedings and transactions which might prejudice their civil rights was the prime purpose of the act. We give effect here to the congressional intent by answering the above question affirmatively.

Defendant Ebert, his counsel says, "does not claim to be a bona fide purchaser for value without notice." The opinion of the trial judge correctly disposes of another question raised, which we need not discuss.

The decree is reversed. Decree will be entered here permitting redemption upon payment to defendants or to the clerk of this court of the amount of principal due, expenses of the foreclosure and unpaid interest to the date of the tender, (the amount we hope will be agreed upon by counsel, or it may be determined upon settlement of the decree) and setting aside the sheriff's deed and the deed to Ebert, with costs of both courts to plaintiff.

(S.) George N. Clark, Howard Wiest, Grant Fellows, John S. McDonald, Jno. E. Bird, Nelson Sharpe, J. H. Steere.

[File endorsement omitted.]

[fol. 158] [Title omitted]

In this cause a motion for rehearing is duly submitted.

[fol. 159] MICHIGAN SUPREME COURT

[Title omitted]

ORDER DENYING MOTION FOR REHEARING

A motion for rehearing having been heretofore submitted herein, it is hereby denied, with costs to plaintiff.

[fol. 160] MICHIGAN SUPREME COURT

[Title omitted]

DECREE—June 12, 1923

This cause having been brought to this Court by appeal by the plaintiff from the Circuit Court for the County of Wayne, in Chancery, having been argued by counsel and due deliberation had thereon, It is now ordered, adjudged and decreed by the Court that the decree of the Circuit Court for the County of Wayne, in Chancery, be and the same is hereby reversed, vacated, set aside and held for

naught and that the deed from the sheriff of Wayne County to the defendants, Andrew J. Keary and Ella R. Keary, husband and wife, dated February 5, 1918, and recorded in the office of the Register of Deeds for the County of Wayne and State of Michigan on February 7, 1918, in Liber 1032 of Deeds on page 526; and the deed from the defendant Edmund L. Ebert, dated December 18, 1919, and recorded in the office of the Register of Deeds for the County of Wayne and State of Michigan on April 26, 1920, in Liber 1414 of deeds on page 265, be vacated, set aside and held for naught upon payment to the defendants or to the clerk of this Court within four (4) months from the date hereof of the sum of nineteen hundred forty-five and 39/100 (\$1,945.39) Dollars and that this decree or a true copy thereof be recorded in the office of the Register of Deeds for the County of Wayne and State of Michigan as a vacation of the deeds aforesaid and as a redemption from the mortgage, by the plaintiff herein of

Lots numbered thirty-two (32), thirty-five (35), thirty-seven (37), thirty-nine (39), forty-one (41), forty-three (43), forty-five (45), and forty-seven (47) in Sunnyside Subdivision of Quarter Section One (1), Ten Thousand Acre (10,000) Tract, Hamtramck, according to the plat thereof recorded December 31, 1892 in Liber 18 of Plats on page 2 in the office of the Register of Deeds for Wayne County, State of Michigan,

[fol. 161] and as a discharge of the lien thereof made and dated September 25, 1916, by Eddie A. Hullett and Nellie E. Hullett, his wife, to the defendants Andrew J. Keary and Ella R. Keary, his wife, recorded in the office of the Register of Deeds for the County of Wayne and State of Michigan on September 27, 1916, in Liber 795 of mortgages on page 506.

And it is further ordered, adjudged and decreed that the plaintiff do recover of and from the said defendants, his costs, both in the Wayne Circuit Court and in this Court, to be taxed, and that plaintiff have execution therefor.

It is further ordered, adjudged and decreed that if the plaintiff shall make default in payment of the sum aforesaid within the time hereinbefore limited to be paid as aforesaid, then in that case it is ordered, adjudged and decreed that the said plaintiff's Bill of Complaint be dismissed out of this Court with costs to be taxed and that the defendants have execution therefor.

[fol. 162] STATE OF MICHIGAN:

IN THE SUPREME COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all proceedings had and determined in the above entitled cause, by said Supreme Court; including the written decision and reasons therefor, signed by the Justices of said Court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at the City of Lansing, this 28th day of June, in the year of our Lord, one thousand nine hundred and twenty-three.

Jay Mertz, Clerk of the Supreme Court of the State of Michigan. (Seal of the Supreme Court of Michigan, Lansing.)

[fol. 163]

[Title omitted]

Supplemental Return

[fol. 164] STATE OF MICHIGAN:

SUPREME COURT

[Title omitted]

MOTION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Now come Edmund L. Ebert, Andrew J. Keary and Ella R. Keary, defendants and appellees, by Thomas J. Bresnahan and Elmer H. Groefsema, their attorneys, and respectfully move this honorable court to grant them a rehearing of this cause or that the opinion filed in said cause be modified, for the following reasons:

(1) Because over thirty-two thousand (\$32,000.00) dollars' worth [fol. 165] of improvements are, by the decision of this court, awarded to plaintiff at the expense of the defendants without one cent being paid therefor, in that, there is now a dwelling house on each of the lots costing at an average of four thousand (\$4,000.00) dollars apiece.

Ogooshevitz v. Arnold, 197 Mich. 203; 12 C. J. 1254.

(2) Because these defendants could not comply with a decree of this court if entered in pursuant of the opinion herein rendered, in that, before the time of the filing of the bill of complaint in this case, the lots and dwelling houses thereon had been sold to purchasers for value without notice, who are not parties to this litigation (R. 89).

Marussa vs. Temerowski, 204 Mich. 271.

(3) Because the Soldiers and Sailors Civil Relief Act, as construed by this court in this cause, deprives these defendants of property without compensation and without due process of law, in violation of the Fifth Amendment and of the Fourteenth Amendment to the Constitution of the United States, in that no compensation is allowed them for the extension measured by the period of military service, there being no obligation upon the mortgagor to redeem, the sale having terminated the mutual contractual obligations created by the mortgage, and no obligation resting on the mortgagor to pay taxes or insurance expended by the mortgagee or purchaser after the sale in the event the mortgagor does elect to redeem.

Barnitz v. Beverly, 163 U. S. 118;

[fol. 166] Walton v. Hollywood, 47 Mich. 385

Wood v. Button, 205 Mich. 692;

Mundy v. Monroe, 1 Mich. 68;

Groesbeck v. Seeley, 13 Mich. 329;

Todd v. Davis, 32 Mich. 160.

27 Cyc. 1491.

(4) Because a sale under power of sale or by decree of a court in chancery, had prior to the passage of the Soldiers and Sailors Civil Relief Act, has at least as great an efficacy to finally terminate the period of redemption as a sale under and in pursuance of the provisions of Section 302 of the Soldiers' and Sailors' Civil Relief Act after the passage of the Act against a mortgagor not then in the military service.

John Hancock Mutual Life Insurance Co. v. Lester, 125 N. E. 594.

(5) Because the decision of this court is in conflict with the decisions of the United States Supreme Court as expressed in Barnitz v. Beverly, 163 U. S. 118, limiting the operation of statutes extending the redemption period to mortgage sales had subsequent to such legislative enactment.

This motion is based upon the files and records in said cause and briefs filed therein, the affidavits of H. Charles Edwards and Elmer H. Groefsema, and the opinion of this court. Further, in making this motion and in asking for the relief herein, it is not the intention of the defendants to waive any rights given them by the laws of the State of Michigan as heretofore construed or to acquiesce in the in-[fol. 167] terpretation given by the Supreme Court of the State of

Michigan to the Act of Congress known as the Soldiers' and Sailors' Civil Relief Act.

Thomas J. Bresnahan and Elmer H. Groefsema, Attorneys
for Defendants and Appellees. P. J. M. Hally, of Counsel.

STATE OF MICHIGAN:

IN THE SUPREME COURT

[Title omitted]

AFFIDAVIT OF E. H. GROEFSEMA

Elmer H. Groefsema, being duly sworn, deposes and says that he is the attorney for the defendants and appellees in the above entitled cause; that on the 13th of January, 1923, deponent addressed a letter to Mr. Louis Cohane, attorney for the plaintiff, as follows:

[fol. 168]

"Jan. 13, 1923.

Mr. Louis Cohane, Attorney-at-Law, 830 Penobscot Building, Detroit, Michigan.

DEAR MR. COHANE: Please accept my hearty congratulations upon your victory in the Supreme Court in the case of Dr. Harry Poston vs. Edmund L. Ebert et al.

In the Saturday, Jan. 6th issue of the Detroit Free Press, you are quoted to the effect that the improvements on the premises in question now belong to the plaintiff in the case, under the decision of the court, upon payment of the amount due on the mortgage.

We are informed by Mr. Edwards that each house has a present replacement value of approximately \$4,000.00. Our clients would like your written expression of opinion as to what plaintiff is now entitled to.

We trust that we may be favored with your reply at an early date.

Yours very truly, (Signed) Elmer H. Groefsema."

Deponent further says that on the 15th of January, 1923, in answer to the aforesaid letter, he received from Mr. Louis Cohane the following letter:

[fol. 169]

"January 15th, 1923.

Mr. Elmer H. Groefsema, Attorney and Counselor, 329 Majestic Building, Detroit, Michigan.

DEAR MR. GROEFSEMA:

In re Poston v. Keary

I am very appreciative of the fine spirit of your letter of congratulations upon the decision of the Supreme Court in the case of Poston vs. Ebert et al.

Experience in public life makes me suggest that newspaper quotations are often inaccurate and unauthorized.

I would not attempt to give a legal opinion without thorough investigation of the law.

As the matter now stands, I am only in a position to say that under the decision of the Michigan Supreme Court and as between the parties to the case, the plaintiff is permitted to redeem 'upon payment to defendant or to the Clerk of this Court of the amount of principal due, expenses of the foreclosure and unpaid interest to the date of the tender, * * * and setting aside the Sheriff's Deed and deed to Ebert with costs of both courts to plaintiff.'

I trust that the foregoing covers the expression of opinion which your clients wish to obtain from me.

In the meantime, you will recall that I have been waiting for several weeks for you to take up with me the matter of agreeing upon the amount necessary to redeem, as suggested by the Supreme Court, in order that a consent decree may be filed. Please let me hear from you with reference to this at once.

[fol. 170] With the kindest of personal regards, I remain,

Cordially yours, (Signed) Louis Cohane."

Elmer H. Groefsema.

Notary's certificate omitted.

STATE OF MICHIGAN:

SUPREME COURT

[Title omitted]

AFFIDAVIT OF H. C. EDWARDS

H. Charles Edwards of the City of Detroit, County and State aforesaid, being duly sworn, deposes and says: That he now is and for upwards of three years last past has been engaged in the building business in the City of Detroit.

[fol. 171] Deponent further says that on the 15th day of October A. D. 1919, he purchased on land contract from Edmund L. Ebert, one of the above named defendants, the following parcels of land, to-wit:

Lots numbered thirty-two (32), thirty-five (35), thirty-seven (37), thirty-nine (39), forty-one (41), forty-three (43) and forty-seven (47) in Sunnyside Subdivision of Quarter (¼) Section one (1), Ten Thousand Acre Tract, Hamtramck, according to the plat thereof recorded December 31, 1892, in Liber Eighteen (18) of Plats, on page Two (2) in the Office of the Register of Deeds for Wayne County, Michigan.

Deponent further says that the purchase price was \$550.00 per lot, and that said lots at that time were vacant.

Deponent further says that on the 1st day of March, 1920, deponent commenced building operations on said lots. That all of said houses were completed, sold and occupied prior to August 1, 1920.

Deponent further says that Ezra H. Fry, attorney, examined the abstract for deponent prior to said purchase of said lots.

Deponent further says that on each of said lots there is now a dwelling house built by deponent, and that the present value of replacement on each of said houses is at least \$4,000.00. That deponent does not at this time own any of said lots, and that the same have been resold by deponent, to individual purchasers.

Further deponent says not.

H. Charles Edwards.

Notary's certificate omitted.

[fol. 174] STATE OF MICHIGAN:

SUPREME COURT

[Title omitted]

OBJECTIONS AND BRIEF OPPOSING "MOTION FOR RE-HEARING AND BRIEF IN SUPPORT THEREOF"

Now comes Dr. Harry P. Poston, plaintiff in the above entitled cause, by Cohane, Rhodes, Garvett and Frankel, as his attorneys, and files these as his objections to the "Motion for Re-Hearing and Brief in Support Thereof," heretofore filed in the cause by appellees therein, for the following reasons:

[fol. 175] 1. Because the matters set forth in said Motion have already been adjudicated and specifically passed upon by this court.

2. Because the case of

Barnitz v. Beverly, 163 U. S. 118,

relied upon by defendants, has no application to the case at bar, because it construes a State statute impairing the obligation of a mortgage contract, while this case involves an Act of Congress as a war measure of the United States under its war powers.

3. Because defendants do not claim to have, and have not, erected a dollar's worth of improvements upon the property involved in the above entitled cause.

4. Because the defendants do not come into this Court of Equity and Conscience "with clean hands."

5. Because, quoting from the opinion of this court, "Defendant Ebert, his counsel says, 'does not claim to be a bona fide purchaser for value without notice.' The opinion of the trial judge correctly disposes of another question raised, which we need not discuss."

6. Because H. Charles Edwards, who claims to have erected buildings on said property, is not a party in said cause and his rights, or claim of rights, are not before this court for adjudication, so that it is not proper for plaintiff to make answer thereto in this proceeding.

[fol. 176] 7. Because H. Charles Edwards' remedy, if any, is as against the defendants in this cause, through whom he derives title by warranty deeds.

8. Because H. Charles Edwards, before he purchased the property from defendants, had actual notice, and constructive notice by record in the Wayne County Register of Deeds Office, of plaintiff's rights in the said property.

9. Because, "Where a purchaser makes improvements while there is a right of redemption, he cannot have credit therefor in the event of redemption. * * * The purpose of this rule is to prevent the purchaser from increasing the burrden of the redemptioner."

Cowan Tent No. 61 v. Treesh (Ind. 1922), 136 N. E. 93-99.

(The strength of this case as authority will be more clear from the facts set forth in the dissenting opinion therein).

10. Because this court could have, should have, and should now, by an addenda opinion filed with its denial of the motion for rehearing, grant plaintiff the same relief its written opinion on file allows, but basing its decision also upon the general equitable jurisdiction of this court, as a matter of law, independent of and in addition to the authority of this court under the Soldiers and Sailors Civil Relief Act, under the testimony in the record showing plaintiffs' equities, and defendants' iniquities and conspiracy to defraud.

[fol. 177] Millard v. Truax, 50 Mich. 343;

McIntyre v. Wyckoff, 119 Mich. 557;

Brown v. Burney, 128 Mich. 204;

Williams v. Bolt, 170 Mich. 517;

Dalton v. Weber, 203 Mich. 453;

Hunt v. Rousmanier, 8 Wheat. 174 (U. S. Supreme Court)
5 L. Ed. 589, 600;

Schroeder v. Young, 161 U. S. 334,

as analyzed and set forth in our original brief from page 43 on. (This court has not yet passed upon the Michigan law applicable to this case as raised in our brief).

These objections are based upon the files and records in the above entitled cause.

Cohane, Rhodes, Garvett, & Frankel, Attorneys for Plaintiff,
830 Penobscot Building, Detroit, Michigan. Louis Co-
hane, of Counsel.

Dated at Detroit, February 24, 1923.

IMPORTANT DATES

Feb. 5, 1918. Mortgage foreclosure sale.

Feb. 5, 1919. Expiration of year for redemption, except for military service.

[fol. 178]

May 14, 1919. Plaintiff discharged from military service.

July 24, 1919. Exhibit 11 (R. 126), defendant Keary's letter stating the amount necessary to redeem.

Oct. 15, 1919. This is the date upon which Edwards, in his affidavit in the motion for rehearing, claims to have purchased the property from Ebert at \$550 a lot, \$50 down and the balance in six months, a month before either Ebert or Keary claim Ebert purchased it (Ebert, R. 106).

Nov. 20, 1919. Date of plaintiff's tender to defendants to redeem from mortgage foreclosure sale following negotiations by defendants for purchase of property from plaintiff, by the lower court found to constitute an estoppel (Opinion of Court, R. 112, 116) and affirmed in the opinion of this court.

Dec. 17, 1919. Record with Wayne County Register of Deeds of plaintiff's right to redeem, "said right to redemption still subsisting in said first party by reason of his having been in the military service during the time when otherwise his right to redemption would have been foreclosed by the lapse of time" (Exhibit 7, R. 124).

[fol. 179]

Dec. 18, 1919. Date of Kearys' deed to Ebert. (Defendants' Exhibit G, R. 146).

Dec. 18, 1919. Date Notary Public certifies deed was acknowledged before him.

Mar. 29, 1920. Date of Notary Public's commission from the Governor of the State, under the laws of the State.

Mar. 29, 1924. Date Notary Public certifies his commission expires

Apr. 26, 1920. Date of record in Wayne County Register of Deeds Office of Kearys' deed to Ebert (Defendants' Exhibit G, R. 146).

May 1, 1920. First deed from Ebert to Edwards of any of the lots in this case (lot 45), recorded in Wayne County Register of Deeds Office, liber 1416, page 385.

Dec. 31, 1919. Keary still paying taxes on this property (Defendants' Exhibit D, R. 143).

Jan. 30, 1920. Keary still paying taxes on this property (Defendants' Exhibit B, R. 138).

Mar. 1, 1920. Date Edwards swears in affidavit on motion for rehearing he started building operations.

[fol. 180]

Mar. 16, 1920. Date official record to defendants at their request of plaintiff's military service (Defendants' Exhibits E and F, R. 144-145), subsequent to which Ebert and Keary swear they soul property to Edwards (R. 144-145), although Edwards claims to have purchased on October 15, 1919.

VARIOUS DEEDS OF PROPERTY IN QUESTION FROM EBERT TO EDWARDS
AS RECORDED IN THE WAYNE COUNTY REGISTER OF DEEDS
OFFICE

May 1, 1920. Lot 45.

July 20, 1920. Lot 39.

Aug. 2, 1920. Lots 32, 35 and 41.

Nov. 3, 1920. Lot 47.

Lots 37 and 43.

[fol. 181]

[Title omitted]

In this cause a motion for rehearing is duly submitted.

[fol. 182] STATE OF MICHIGAN :

SUPREME COURT

[Title omitted]

Before the Entire Bench

OPINION ON MOTION FOR REHEARING—Filed April 27, 1923

Per CURIAM: A motion for rehearing has been filed. In it constitutional questions are discussed which were not urged in the original brief. Under numerous decisions of this Court, constitutional questions may not be raised for the first time on motion for rehearing. It is also made to appear that the lots involved have been sold and substantial houses erected on them. The purchasers, however, are not before us. They are in possession. Unless the parties come to an adjustment, we may assume plaintiff will bring ejectment to recover possession. In such action the question of whether such purchasers are entitled to the benefits of sections 13211 et seq. C. L. 1915, and if so to what extent, will be before the Court. Such purchasers not being parties to this proceeding their rights can not be here adjudicated. The motion for rehearing will be denied.

[File endorsement omitted.]

[fol. 183]

[Title omitted]

A motion for rehearing having been heretofore submitted herein, it is hereby denied, with costs to plaintiff.

[fol. 184]

MICHIGAN SUPREME COURT

[Title omitted]

ORDER RE SATISFACTION OF DECREE

On reading and filing the stipulation of the parties to the above entitled cause, by their respective counsel, and in accordance therewith, it appearing therefrom that a petition for certiorari in the above entitled cause has been filed with and submitted to the United States Supreme Court: It is by the Court now here ordered that the decree of this Court heretofore and on June 12th, 1923, filed in the above entitled cause may be satisfied by a tender by the plaintiff and appellant of the redemption money in said decree mentioned to the defendants or as in said decree provided at any time subsequently hereto and within thirty days after the denial of the writ of certiorari by the United States Supreme Court, should it be denied; and should the writ of certiorari be granted by the United States Supreme Court, then at any time subsequent hereto and within thirty (30) days after the affirmance of the decision of the Michigan Supreme Court by the United States Supreme Court, should it be affirmed; it being the purpose hereof also in accordance with the intent and purpose of the parties to the above entitled cause that tender of the redemption money to the above named defendants as in said decree provided may be made at any time subsequent hereto, and within thirty (30) days after a final disposition of this matter by a decision of the United States Supreme Court with like force and effect as though made as provided in the decree of this Court now on file in this cause.

[fol. 185]

SUPREME COURT OF MICHIGAN

[Title omitted]

CLERK'S CERTIFICATE

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify and return in pursuance of the written agreement of the attorneys for the respective parties hereto that the transcript of the record furnished with the application for a writ of certiorari in this cause is a full, true and complete transcript of all of the proceedings had and determined in said cause, except the proceedings had in this Court on motion for rehearing; I hereby further certify that the annexed and foregoing is a true copy of the motion for rehearing, the objections thereto, the order of submission, the opinion of the Court thereon, and the order of denial, together with an order

fixing the time when the decree should go into effect. I further certify that that portion of the objections to the motion for rehearing, headed "Important Dates," was objected to by counsel for plaintiffs in certiorari as not a proper part of the objections to said motion and is returned herewith by me upon the order of the Chief Justice of this Court. I further certify that I have compared the papers sent herewith with the originals on file in my office and that each is a true and correct transcript of the original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this seventh day of December, in the year of our Lord, one thousand nine hundred and twenty-three.

Jay Mertz, Clerk. (Seal of the Supreme Court of Michigan, Lansing.)

[fol. 186] UNITED STATES OF AMERICA, ss:

WRIT OF CERTIORARI AND RETURN—Filed December 11, 1923

(Seal of the Supreme Court of the United States.)

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Being informed that there is now pending before you a suit in which Harry P. Poston is appellant, and Edmund L. Ebert, Andrew J. Keary, and Ella R. Keary are appellees, No. 30,420, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court for the County of Wayne, In Chancery, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United [fol. 187] States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 188] To the Supreme Court of the United States:

The execution of the within writ appears by the transcript of Record hereto annexed.

Dated December 7th, 1923.

Jay Mertz, Clerk of the Supreme Court of the State of Michigan. (Seal of the Supreme Court of Michigan, Lansing.)

[fol. 189] [File endorsement omitted.]

AUG 20 1923

WM. R. STANSBU

CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 153

**EDMUND L. EBERT, ANDREW J. KEARY, AND
ELLA R. KEARY, PETITIONERS,**

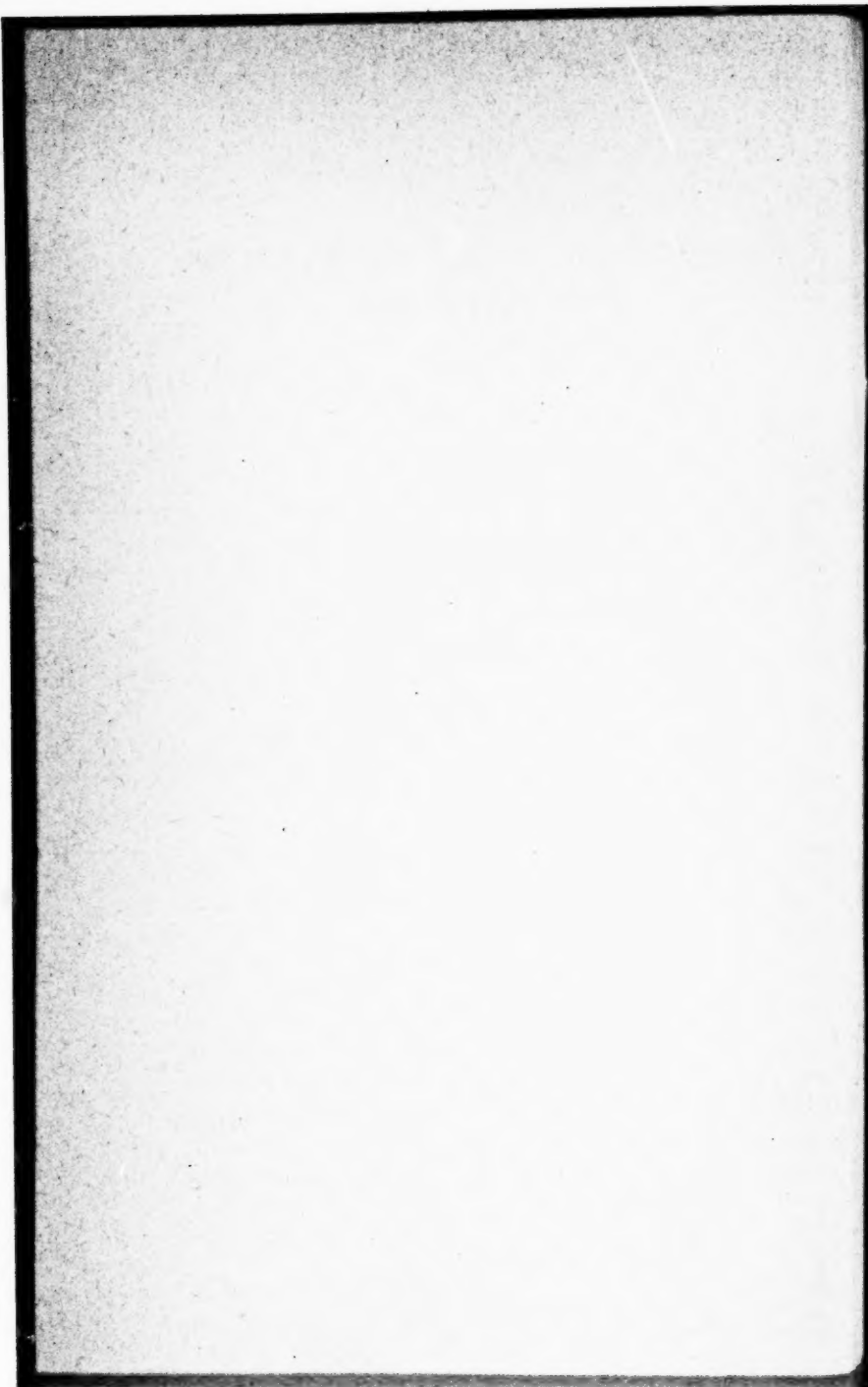
vs.

DR. HARRY P. POSTON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

P. J. M. HALLY,
Counsel for Petitioners.

(29,822)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 512.

EDMUND L. EBERT, ANDREW J. KEARY, AND
ELLA R. KEARY, PETITIONERS,

vs.

DR. HARRY P. POSTON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition for a writ of certiorari of Edmund L. Ebert, Andrew J. Keary, and Ella Keary respectfully shows unto this honorable court as follows:

1. That the respondent, Dr. Harry P. Poston, in May, 1917, purchased certain lots located in the township of Hamtramck, Wayne County, Michigan; at the time of his purchase, these lots, with certain others, were subject to a mortgage in the sum of \$4,000.00. A clause in the mortgage provided for a release from its provisions of any lot on the payment of \$200.00 and interest. To this extent, the re-

spondent assumed the mortgage and agreed to pay it (Record, 120; Exhibit 1).

2. That on February 5, 1918, under a power of sale contained in this mortgage, because of default in the payment of principal and interest, his lots were sold at public auction to Andrew J. Keary and Ella Keary, at the time and place fixed by the law of Michigan, a copy of which is hereto affixed as Exhibit 1 hereof (Record, 38). That on the same date after the sale in accordance with the provisions of (14957) section 9 of said Exhibit 1, the sheriff's deed of this property to Andrew J. Keary and Ella R. Keary, the purchasers, was made, recorded and placed in the custody of the Register of Deeds of Wayne County, Michigan (Record, 83, 112, 130; Exhibit A).

3. That on March 8, 1918, one month and three days after this sale, the Congress of the United States passed the "Soldiers' and Sailors' Civil Relief Act," a copy of which is hereto affixed as Exhibit 2 hereof.

4. That on September 29, 1918, the respondent, Dr. Harry P. Poston, began service in the army of the United States and remained there until May 14, 1919, when he was honorably discharged (Record, 121; Exhibit 3 of record).

5. That on February 5, 1919, the period of time during which, under Michigan law, the lots might be redeemed from the sale of February 5, 1918, expired (Record, 112).

6. That the respondent, on his return to Detroit in July, 1919, after his discharge from the army, carried on some negotiations with the petitioner Ebert, looking to a settlement, but no agreement was reached, and on November 19,

1919, two attorneys representing him went to Ebert's office and tendered him a certified check in the sum of \$1,735.93 and made a demand "for the contract on the property" (Record, 68, 123; Exhibit 5).

7. That on December 18, 1919, the petitioners Andrew J. Keary and Ella R. Keary, the purchasers at the sheriff's sale, deeded the lots to the petitioner, Edmund L. Ebert (Record, 146; Exhibit G).

8. That on January 13, 1920, the respondent took a certified check in the sum of \$1,850.00 and \$200.00 in cash and tendered these to the Register of Deeds for the purpose of redeeming the lots from the mortgage sale. The Register of Deeds declined to accept the tender (Record, 60).

9. That on August 19, 1920, the bill of complaint in this cause was filed in the Circuit Court for the County of Wayne, State of Michigan, and on October 23, 1920, the defendants therein, petitioners here, answered said bill of complaint, and in due time said cause came on to be heard in said court (Record, V).

10. That in said bill of complaint, in the seventh paragraph thereof, the respondent herein alleged as follows:

"Your orator further shows unto this honorable court that said sheriff's deed aforesaid constitutes a cloud upon the title of your orator in and to said premises and should be removed therefrom by this honorable court upon such terms as this court shall deem equitable; and further that your orator should have a right to redeem said premises from the mortgage upon it because said mortgage sale was defective; because * * * and because of your orator's hav-

ing been in the military service of the United States and being therefore entitled to the benefit of the provisions of the Soldiers' and Sailors' Civil Relief Act, so called, as hereinafter set forth."

That in the prayer for relief of said bill of complaint paragraph (d) was as follows:

"That by the decree of this court under the facts and circumstances as hereinbefore set forth and under the provisions of the Soldiers' and Sailors' Civil Relief Act, so called, and under the equitable jurisdiction of this court it may be found that your orator's time for redemption had not expired when tender was made and that your orator in justice and equity is entitled to redeem from said mortgage foreclosure sale."

11. That the petitioners herein in their answer as defendants to said seventh paragraph of said bill of complaint replied as follows:

"Defendants deny that said sheriff's deed, Exhibit B, constitutes only a cloud upon the title of the plaintiff in and to said premises, and jointly and severally deny * * * jointly and severally deny that plaintiff is or at any time was entitled to the benefit of the provisions of the so-called Soldiers' and Sailors' Civil Relief Act."

12. That the Circuit Court for the County of Wayne, after hearing said cause on proofs taken in open court, filed an opinion therein (Record, 112) and held that the tender would have been legal because of the estoppel raised by the negotiations if they had been commenced within the period of redemption, as fixed by the laws of the State of Michigan.

That these negotiations were not commenced until after plaintiffs' right to redem had expired, and that the act of Congress did not extend the period of redemption and entered a decree dismissing respondents' (plaintiffs') bill of complaint (Record, 117).

13. That an appeal was taken from this decree to the Supreme Court of the State of Michigan, where the cause was heard *de novo* on the record. After a hearing and on due consideration, said court reversed the decree of the lower court and filed its opinion on December 29, 1922, a copy of which is added to the record. That on February 6, 1923, a motion was made for a rehearing before said court. In disposing of this, it filed its opinion on April 27, 1923, a copy of which is hereto affixed as Exhibit 3 hereof, and on June 12, 1923, a decree was entered in said court in said cause a copy of which is added to the record, and that said decree is the decree of the highest court in the State of Michigan.

14. That the respondent herein, in said bill of complaint in the State court, claimed a right, title, privilege and immunity under the statute of the United States, and the petitioners in the State court denied said claim and the decision of the Supreme Court of the State of Michigan is in favor of the title, right, privilege and immunity, under act of Congress, especially set up by the respondent in his bill of complaint and denied by the petitioners in their answer.

15. That there is error in the conclusion reached by the Michigan Supreme Court; that a meaning and intent has been given to this law which Congress never gave it or intended to give it; that a case has been brought within its purview which is not within it and was never intended to

be within it, and that this meaning and intent is prejudicial to these petitioners, has confiscated their property and destroyed property rights vested in them before the passage of the act. That the erroneous conclusion reached by the Supreme Court of Michigan and the relief granted are based alone on the construction given to the act of Congress.

16. That the conclusion reached by the Supreme Court of Michigan is opposed to decisions from two other States as evidenced in *Taylor vs. McGregor State Bank*, 144 Minn., 249, and *Wood vs. Vogel*, 204 Ala., 692, and the consequent confusion arises from the interpretation and construction of the same Federal statute by these various tribunals.

17. That this is the first time the question herein involved has ever been presented to this honorable court, and that the legal and just construction, interpretation and effect of the "Soldiers' and Sailors' Civil Relief Act" involved in and presented by this case of petitioners should be authoritatively and finally adjudged by this honorable court upon and after a full presentation to the court of the merits of the said question, because this court alone can give to said law its true intent and meaning and avoid the confusion which has arisen and which will continue to arise from the different conclusions had by the highest courts of the various States.

Wherefore your petitioners, in accordance with the amendment of the Federal Judicial Code of September 6, 1916, respectfully pray that a writ of certiorari issue out of and under the seal of this court, directed to the Supreme Court of the State of Michigan, commanding said court to certify and send to this court on a day certain to be therein desig-

nated a full and complete transcript of the record and all proceedings of said court in this case, which was entitled in that court Dr. Harry P. Poston, plaintiff, *vs.* Edmund L. Ebert, Andrew J. Keary, and Ella R. Keary, defendants, to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate and that the decree of said Supreme Court of the State of Michigan in this cause may be reversed by this honorable court.

P. J. M. HALLY,

Attorney for Edmund L. Ebert, Andrew J.

Keary, and Ella R. Keary, Petitioners.

STATE OF MICHIGAN,

County of Wayne, ss:

P. J. M. HALLY, being duly sworn, deposes and says that he is one of the counsel for the petitioners, Edmund L. Ebert, Andrew J. Keary, and Ella R. Keary, in the above-entitled cause, and that as such he has read the petition by him subscribed, and that the facts therein stated are true to the best of his information and belief.

P. J. M. HALLY.

Subscribed and sworn to before me this 17th day of August, A. D. 1923.

BEATRICE TACKE,

Notary Public, Wayne County, Michigan.

My commission expires Oct. 20, 1925.

EXHIBIT 1.**Compiled Laws of Michigan, 1915.***Chapter 249.—Foreclosure of Mortgages by Advertisement.*

(14949.) **SECTION 1.** Every mortgage of real estate, containing therein a power of sale, upon default being made in any condition of such mortgage may be foreclosed by advertisement, in the cases and in the manner hereafter specified.

(14950.) **SEC. 2.** To entitle any party to give a notice as hereinafter prescribed, and to make such foreclosure, it shall be requisite:

1. That some default in a condition of such mortgage shall have occurred, by which the power to sell became operative;
2. That no suit or proceeding shall have been instituted at law, to recover the debt then remaining secured by such mortgage, or any part thereof; or if any suit or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied, in whole or in part; and
3. That the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned, that all the assignments thereof shall have been recorded;
4. In cases of mortgages given to secure the payment of money by installments, each of the installments mentioned in such mortgage after the first, shall be taken and deemed to be a separate and independent mortgage, and such mortgage for each of such installments may be foreclosed in the same manner, and with the like effect, as if such separate mortgages were given for each of such subsequent install-

ments, and a redemption of any such sale by the mortgagor shall have the like effect as if the sale for such installments had been made upon an independent prior mortgage.

(14951.) SEC. 3. Notice that said mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for twelve successive weeks, at least once in each week, in a newspaper printed in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated, if there be one; and if no newspaper be printed in such county, then such notice shall be published in a paper published nearest thereto.

(14952.) SEC. 4. Every such notice shall specify:

1. The names of the mortgagor and of the mortgagee, and the assignee of the mortgage, if any;
2. The date of the mortgage, and when recorded;
3. The amount claimed to be due thereon at the date of the notice and
4. A description of the mortgaged premises, conforming substantially with that contained in the mortgage.

(14953.) SEC. 5. The sale shall be at public vendue, between the hour of nine o'clock in the forenoon and the setting of the sun, at the place of holding the circuit court within the county in which the premises to be sold, or some part of them, are situated, and shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, under sheriff, or a deputy sheriff of the county, to the highest bidder.

(14954.) SEC. 6. Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication

until the time to which the sale shall be postponed, at the expense of the party requesting such postponement.

(14955.) SEC. 7. If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as one parcel, they shall be sold separately, and no more farms, tracts or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the costs and expenses allowed by law; but if distinct lots be occupied as one parcel, they may in such case be sold together.

(14956.) SEC. 8. The mortgagee, his assigns, or his or their legal representatives, may, fairly and in good faith, purchase the premises so advertised, or any part thereof, at such sale.

(14957.) SEC. 9. The officer or person making the sale shall forthwith execute, acknowledge, and deliver to each purchaser a deed of the premises bid off by him; and if the lands are situated in several counties, he shall make separate deeds of the lands in each county, and specify therein the precise amounts for which each parcel of land therein described was sold. And he shall indorse upon each deed the time when the same will become operative in case the premises are not redeemed according to law. Such deed or deeds shall, as soon as practicable, and within twenty days after such sale, be deposited with the register of deeds of the county in which the land therein described is situated, and the register shall indorse thereon the time the same was received, and for the better preservation thereof, shall record the same at length in a book to be provided in his office for that purpose, and shall index the same in the regular index of deeds; and the fee for recording the same shall be included among the other costs and expenses allowed by law. In case such premises shall be redeemed, the register of deeds shall, at the time of destroying such deed, as provided in section twelve of this chapter, write on

the face of such record the word "Redeemed," stating at what date such entry is made, and signing such entry with his official signature.

(14958.) SEC. 10. Unless the premises described in such deed shall be redeemed within the time limited for such redemption, as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and cancelled, as hereinafter provided; and the record thereof shall thereafter, for all purposes, be deemed a valid record of said deed, without being re-recorded; but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby.

(14959.) SEC. 11. If the mortgagor, his heirs, executors, administrators, or any person lawfully claiming from or under him or them, shall, within one year from the time of such sale, redeem the entire premises sold, by paying to the purchaser, his executors, administrators, or assigns, or to the register of deeds in whose office such deed is deposited, for the benefit of such purchaser, the sum which was bid therefor, with interest from the time of the sale at the rate per cent borne by the mortgage, not exceeding ten per cent per annum, and in case such payment is made to the register of deeds, the sum of one dollar as a fee for the care and custody of such redemption money, then such deed shall be void and of no effect; but in case any distinct lot or parcel separately sold shall be redeemed, leaving a portion of the premises unredeemed, then such deed shall be inoperative merely to the parcel or parcels so redeemed, and to those portions not so redeemed shall remain valid and of full effect.

(14960.) SEC. 12. Upon the payment of the entire sum bid at such sale, and interest thereon, and the fee of one dollar mentioned in the preceding section, as aforesaid, to the register in whose office the deed therefor shall have been deposited, or upon delivering to such register a certificate, signed and acknowledged by the person entitled to receive the same, and certified by some officer authorized to take the acknowledgment of deeds, setting forth that such sum, with interest, has been paid to such person, and upon paying to such register a fee of twenty-five cents, such register shall thereupon destroy such deed, and shall enter in the margin of the record of such mortgage a memorandum that such mortgage is satisfied, or, in case the premises shall have been sold in parcels, and one or more of said parcels shall have been redeemed, as hereinbefore provided, it shall then be the duty of the register to enter upon the face of said sheriff's deed, and the record thereof, a memorandum that the same is inoperative as to the parcel or parcels so redeemed, and to enter in the margin of the record of such mortgage a memorandum that the same is satisfied as to the parcel or parcels so redeemed.

(14961.) SEC. 13. If any person entitled to receive such redemption moneys, shall, upon payment or tender thereof to him, refuse to make and acknowledge such certificate of payment, he shall be liable to the person aggrieved thereby, in the sum of one hundred dollars damages, over and above all the actual damages sustained, to be recovered in an action on the case.

(14962.) SEC. 14. If after any sale of real estate, made as herein prescribed, there shall remain in the hands of the officer or other person making the sale, any surplus money after satisfying the mortgage on which such real estate was sold, and payment of the costs and expenses of such foreclosure and sale, the surplus shall be paid over by such officer or other person on demand, to the mortgagor, his legal rep-

representatives or assigns, unless at the time of such sale, or before such surplus shall be so paid over, some claimant or claimants shall file with such person so making such sale, a claim or claims, in writing, duly verified by the oath of such claimant, his agent or attorney, that such claimant has a subsequent mortgage or lien encumbering such real estate, or some part thereof, and stating the amount thereof unpaid, setting forth the facts and nature of the same, in which case the person so making such sale, shall forthwith upon receiving such claim, pay such surplus to and file such written claim with the register of the circuit court in chancery of the county in which such sale is so made; and thereupon any person or persons interested in such surplus, may apply to said court for an order referring it to a circuit court commissioner of said county, to take proofs of the facts and circumstances contained in such claim or claims so filed, and such commissioner shall, upon receiving such order, summon such claimant or claimants, party or parties interested in such surplus, to appear before him at a time and place to be by him named, and attend the taking such proof, and such claimant or claimants or party interested who shall appear as aforesaid, may examine witnesses and produce such proof as they or either of them may see fit, and the said commissioner shall, after such proofs are closed, at his earliest convenience, report the same to said court with his opinion thereon, and said court shall thereupon make an order in the premises directing the disposition of said surplus moneys or payment thereof in accordance with the rights of such claimant, claimants or persons interested.

(14963.) SEC. 15. Any party desiring to perpetuate the evidence of any sale made in pursuance of the provisions of this chapter, may procure:

1. An affidavit of the publication of the notice of sale, and of any notice of postponement, to be made by the printer of the newspaper in which the same was inserted, or by some person in his employ knowing the facts; and,

2. An affidavit of the fact of any sale pursuant to such notice, to be made by the person who acted as auctioneer at the sale, stating the time and place at which the same took place, the sum bid, and the name of the purchaser.

(14964.) SEC. 16. The affidavits specified in the last preceding section, may be taken and certified by any officer authorized by law to administer oaths.

(14965.) SEC. 17. Such affidavits shall be recorded at length by the register of deeds of the county in which the premises are situated, in a book kept for the record of deeds; and such original affidavits, the record thereof, and certified copies of such record, shall be presumptive evidence of the facts therein contained.

(14966.) SEC. 18. A note referring to the page and book where the evidence of any sale having been made under a mortgage, is recorded, shall be made by the register recording such evidence, in the margin of the record of such mortgage, if such record be in his office.

(14967.) SEC. 19. Upon the payment of the entire sum bid at such sale, and the interest thereon and expenses as in section eleven of this act mentioned, to the register of deeds of the county in whose office the sheriff's deed shall have been deposited, the register of deeds shall give notice of such payment, by mail or otherwise to the purchaser, his agent or attorney.

EXHIBIT 2.**An Act to Extend Protection to the Civil Rights of Members of the Military and Naval Establishments of the United States Engaged in the Present War.**

(Act of March 8, 1918, Ch. —; — Stat. L., —.)

ARTICLE I.*General Provisions.*

SEC. 100. (Soldiers' and Sailors' Civil Relief Act—Suspension of Legal Proceedings and Transactions.)—That for the purpose of enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war (— Stat. L., —).

SEC. 101. (Definitions.)—(1) That the term "persons in military service" as used in this Act, shall include the following persons and no others: All officers and enlisted men of the Regular Army, the Regular Army Reserve, the Officers' Reserve Corps, and the Enlisted Reserve Corps; all officers and enlisted men of the National Guard and National Guard Reserve recognized by the Militia Bureau of the War Department; all forces raised under the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May

eighteenth, nineteen hundred and seventeen; all officers and enlisted men of the Navy, the Marine Corps, and the Coast Guard; all officers and enlisted men of the Naval Militia, Naval Reserve force, Marine Corps Reserve, and National Naval Volunteers recognized by the Navy Department; all officers of the Public Health Service detailed by the Secretary of the Treasury for duty either with the Army or the Navy; and any of the personnel of the Lighthouse Service and of the Coast and Geodetic Survey transferred by the President to the service and jurisdiction of the War Department or of the Navy Department; members of the Nurse Corps; Army field clerks; field clerks, Quartermaster Corps; civilian clerks and employees on duty with the military forces detailed for service abroad in accordance with provisions of existing law; and members of any other body who have heretofore or may hereafter become a part of the military or naval forces of the United States. The term "military service" as used in this definition, shall signify active service in any branch of service heretofore mentioned or referred to, but reserves and persons on the retired list shall not be included in the term "persons in military service" until ordered to active service. The term "active service" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(2) The term "period of military service" as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

(3) The term "person" as used in this Act, with reference to the holder of any right alleged to exist against a person

in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association.

(4) The term "court" as used in this Act shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record.

(5) The term "termination of the war" as used in this Act shall mean the termination of the present war by the treaty of peace as proclaimed by the President (— Stat. L., —).

SEC. 102. (Territory Affected—Courts—Procedure for Enforcing Act.)—(1) That the provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed.

(2) When under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court (— Stat. L., —).

SEC. 103. (Sureties, Guarantors, Indorsers, etc.)—Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, indorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended.

When a judgment or decree is vacated or set aside in whole or in part, as provided in this Act, the same may, in the discretion of the court, likewise be set aside and vacated as to any surety, guarantor, indorser, or other person liable upon the contract or liability for the enforcement of which the judgment or decree was entered.

ARTICLE II.

General Relief.

SEC. 200. (1) (Default, Judgments—Conditions Precedent to Entry—Affidavit as to Military Service.)—That in any action or proceeding commenced in any court if there shall be a default of an appearance by the defendant the plaintiff before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require as a condition before judgment is entered that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss of damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion

be necessary to protect the rights of the defendant under this Act (— Stat. L., —).

(2) (Penalty for False Affidavit.)—Any person who shall make or use an affidavit required under this section knowing it to be false shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both (— Stat. L., —).

(3) (Attorneys to Represent Persons in Military Service.)—In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him, and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts (— Stat. L., —).

(4) (Opening Judgments—*Bona Fide* Purchasers.)—If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any *bona fide* purchaser for value under such judgment (— Stat. L., —).

SEC. 201. (Staying Actions or Proceedings—When Permitted.)—That at any stage thereof any action or proceeding commenced in any court by or against a person in military service during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service (— Stat. L., —).

SEC. 202. (Staying Action on Contract—Effect.)—That when an action for compliance with the terms of any contract is stayed pursuant to this Act no fine or penalty shall accrue by reason of failure to comply with the terms of such contract during the period of such stay, and in any case where a person fails to perform any obligation and a fine or penalty for such non-performance is incurred a court may, on such terms as may be just, relieve against the enforcement of such fine or penalty if it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred and that by reason of such service the ability of such person to pay or perform was thereby materially impaired (— Stat. L., —).

SEC. 203. (Staying Execution of Judgments, etc.—Attachments and Garnishments.)—That in any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service:

(1) Stay the execution of any judgment or order entered against such person, as provided in this Act, and

(2) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, as provided in this act (— Stat. L., —).

SEC. 204. (Period of Stay of Actions, etc.—Codefendants.)—That any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise. Where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others (— Stat. L., —).

SEC. 205. (Computing Period for Bringing Actions—Inclusive of Period of Military Service.)—That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service. (— Stat. L., —).

ARTICLE III.

Rent, Installment, Contracts, Mortgages.

SEC. 300. (1) (Eviction or Distress—Leave of Court.)—That no eviction or distress shall be made during the period of military service in respect of any premises for which the agreed rent does not exceed \$50 per month, occupied chiefly

for dwelling purposes by the wife, children, or other dependents of a person in military service, except upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession (— Stat. L., —).

(2) (Stay of Proceedings.)—On any such application or in any such action the court may, in its discretion, on its own motion, and shall, on application, unless in the opinion of the court the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service, stay the proceedings for not longer than three months, as provided in this Act, or it may make such other order as may be just (— Stat. L., —).

(3) (Violation of Provisions of Section—Penalty.)—Any person who shall knowingly take part in any eviction or distress otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor, and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both (— Stat. L., —).

(4) (Rent—Satisfaction—Allotment of Pay.)—The Secretary of War or the Secretary of the Navy, as the case may be, is hereby empowered, subject to such regulations as he may prescribe, to order an allotment of the pay of a person in military service in reasonable proportion to discharge the rent of premises occupied for dwelling purposes by the wife, children, or other dependents of such person (— Stat. L., —).

SEC. 301. (1) (Installments or Deposits for Property Sold or Leased—Nonpayment and Forfeitures—Rescission of Contracts.)—That no person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price from a person or from the assignor of a

person, who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for non-payment of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction (— Stat. L., —).

(1a) (Violation of Provisions of Section—Penalty.)—Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both (— Stat. L., —).

(2) (Repayment of Prior Installments or Deposits.)—Upon the hearing of such action the court may order the repayment of prior installments or deposits, or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interest of all parties (— Stat. L., —).

SEC. 302. (1) (Secured Obligations.)—That the provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him (— Stat. L., —).

(2) (Proceedings to Enforce—Stay, etc.)—In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of non-payment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

(a) Stay the proceedings as provided in this Act; or

(b) Make such other disposition of the case as may be equitable to conserve the interests of all parties (— Stat. L., —).

(3) (Sales under Judgments.)—No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereof made and approved by the court (— Stat. L. —).

ARTICLE IV.

Insurance.

SEC. 400. (Insurance — Definitions — “Policy” — “Premiums” — “Insured” — “Insurer.”)—That in this Article the term “policy” shall include any contract of life insurance on the level premium or legal reserve plan. It shall also include any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association; the term “premium” shall include membership dues or assessments in such association, and the date of issuance of

policy as herein limited shall refer to the date of admission to membership in such association; the term "insured" shall include any person who is the holder of a policy as defined in this Article; the term "insurer" shall include any corporation, partnership, or other form of association which secures or provides insurance under any policy as defined in this Article (— Stat. L., —).

SEC. 401. (Persons Entitled to Benefits of Article—Forms—Contents—Disposition—Duties of Bureau of War Risk Insurance.)—That the benefits of this Article shall apply to any person in military service who is the holder of a policy of life insurance, when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Secretary of the Treasury. Such form shall set forth particularly that the application therein made is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this Article and by receiving and filing the same the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this Article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Bureau of War Risk Insurance.

The Bureau of War Risk Insurance shall issue through suitable military and naval channels a notice explaining the provisions of this Article and shall furnish forms to be distributed to those desiring to make application for its benefits (— Stat. L., —).

SEC. 402. (Policies to Which Act Applies.)—That the benefits of this Act shall be available to any person in military service in respect of contracts of insurance in force under their terms up to but not exceeding a face value of \$5,000, irrespective of the number of policies held by such person whether in one or more companies, when such con-

tracts were made and a premium was paid thereon before September first, nineteen hundred and seventeen; but in no event shall the provisions of this Article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this Article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than fifty per centum of the cash surrender value of the policy (— Stat. L., —).

SEC. 403. (List of Applicants—Bureau of War Risk Insurance—Rejection of Applications.)—That the Bureau of War Risk Insurance shall, subject to regulations, which shall be prescribed by the Secretary of the Treasury, compile and maintain a list of such persons in military service as have made application for the benefits of this Article, and shall (1) reject any applications for such benefits made by persons who are not persons in military service; (2) reject any applications for such benefits in excess of the amount permitted by section four hundred and two, and (3) reject any applications in respect of contracts of insurance otherwise not entitled to the benefits of this article. Said bureau shall immediately notify the insurer and the insured in writing of every rejection or approval (— Stat. L., —).

SEC. 404. (Rejection of Applications in Excess of Amount Allowed—Preferences.)—That when one or more applications are made under this article by any one person in military service in respect of insurance exceeding a total face value of \$5,000, whether on one or more policies or in one or more companies, and the insured shall not in his application indicate an order of preference, the Bureau of War Risk Insurance shall reject such policies as have the inferior cash surrender value, so as to reduce the total benefits conferred within the face value of \$5,000, and where necessary for this purpose shall direct the insurer to divide any policy into two separate policies. The said bureau shall immediately

notify the insurer and the insured in writing of such selection (— Stat. L., —).

SEC. 405. (Forfeiture of Policy for Nonpayment of Premium.)—That no policy which has not lapsed for the nonpayment of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this article, shall lapse or be forfeited for the nonpayment of premium during the period of such service or during one year after the expiration of such period: Provided, That in no case shall this prohibition extend for more than one year after the termination of the war (— Stat. L., —).

SEC. 406. (Reports by Insurers—Contents.)—That within the first fifteen days of each calendar month after the date of approval of this Act until the expiration of one year after the termination of the war, every insurance corporation or association to which application has been made as herein provided, or the benefits of this Article, shall render to the Bureau of War Risk Insurance a report, duly verified, setting forth the following facts:

First. The names of the persons who have applied for such benefits, and the face value of the policies in respect of which such benefits have been applied for by such persons, during the preceding calendar month;

Second. A list as far as practicable of the premiums in respect of policies entitled to the benefits of this Article which remain unpaid on the last day of the preceding calendar month, which day is at least thirty-one days after the due date of the premiums, provided such premiums have not previously been so reported as in default;

Third. A list of premiums which, having been previously reported as in default, have been paid by the policyholder or some one on his behalf in whole or in part during the preceding calendar month;

Fourth. A computation of the difference between the total amount of defaulted premiums therein reported and the total amount of premiums paid as therein reported, after having been previously reported as in default. From this sum shall be deducted the total sum of any premiums previously reported as in default, upon policies in respect of which the Bureau of War Risk Insurance has, since the date of such report, rejected an application for the benefits of this Article. The final sum so arrived at shall be denominated the monthly difference (— Stat. L., —).

SEC. 407. (Verification and Certification of Reports.)—That the Bureau of War Risk Insurance shall verify the computation of monthly difference reported by each insurer, and shall certify it, as corrected, to the Secretary of the Treasury and the insurer (— Stat. L., —).

SEC. 408. (Delivery of Bonds to Insurers—Insolvency of Insurers—Semiannual Statements by Insurers.)—That the Secretary of the Treasury shall, within ten days thereafter, deliver each month to the proper officer of each insurer, bonds of the United States to the amount of that multiple of \$100 nearest to the monthly difference certified in respect of each insurer. Such bonds shall be registered in the names of the respective insurers, who shall be entitled to receive the interest accruing thereon, and such bonds shall not be transferred, or again registered, except upon the approval of the Director of the Bureau of War Risk Insurance, and shall remain in the possession of the insurer until settlement is made in accordance with this Article: *Provided*, That whenever the fact of insolvency shall be ascertained by the Director of the Bureau of War Risk Insurance all obligations on the part of the United States, under this Article, for future premiums on policies of such insurer shall thereupon terminate. An insurer shall furnish semiannual statements to the Bureau of War Risk Insurance (— Stat. L., —).

SEC. 409. (Bonds as Security for Unpaid Interest—Lien of United States on Policy—Loans and Dividends.)—That

the bonds so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this Article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Bureau of War Risk Insurance must be obtained (— Stat. L., —).

SEC. 410. (Death of Insured—Unpaid Premiums.)—That in the event that the military service of any person being the holder of a policy receiving the benefits of this Article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the insurer as premiums paid (— Stat. L., —).

SEC. 411. (Failure to Pay Past Due Premiums—Effect on Policy.)—That if the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any: *Provided*, That if the insured is in the military service at the termination of the war such lapse shall occur and surrender value be payable at the expiration of one year after the termination of the war (— Stat. L., —).

SEC. 412. (Account Stated Between United States and Insurer—Items Credited to Insurer.)—That at the expiration of one year after the termination of the war there shall be

an account stated between each insurer and the United States, in which the following items shall be credited to the insurer:

(1) The total amount of the monthly differences reported under this Article;

(2) The difference between the total interest received by the insurer upon the bonds held by it as security and the total interest upon such monthly differences at the rate of five per centum per annum; and in which there shall be credited to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in section four hundred and eleven, but not in any case a greater amount on any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans (— Stat. L., —).

SEC. 413. (Payment of Balance in Favor of Insurer.)—That the balance in favor of the insurer shall, in each case, be paid to it by the United States upon the surrender by the insurer of the bonds delivered to it from time to time by the Secretary of the Treasury under the provisions of this Article (— Stat. L., —).

SEC. 414. (Policies to which Act Does Not Apply.)—That this Article shall not apply to any policy which is void or which may at the option of the insurer be voidable, if the insured is in military service, either in this country or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium (— Stat. L., —).

SEC. 415. (Insurers to which Act Applies.)—That this Article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the

collection from all those insured in such insurer of a premium to cover the special war risk of those insured persons who are in military service (— Stat. L., —).

ARTICLE V.

Taxes and Public Lands.

SEC. 500. (1) (Taxes and Assessments.)—That the provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid (— Stat. L., —).

(2) (Enforcement of Collection—Stay.)—When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the war (— Stat. L., —).

(3) (Redemption of Property Sold or Forfeited.)—When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in mili-

tary service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the termination of the war; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption (— Stat. L., —).

(4) (Unpaid Taxes or Assessments—Interest—Penalties.)—Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of six per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon (— Stat. L., —).

SEC. 501. (Public Lands—Entrymen and Settlers in Military Service—Protection of Rights.)—That no right to any public lands initiated or acquired prior to entering military service by any person under the homestead laws, the desert-land laws, the mining-land laws, or any other laws of the United States, shall be forfeited or prejudiced by reason of his absence from such land, or of his failure to perform any work or make any improvements thereon, or to do any other act required by any such law during the period of such service. Nothing in this section contained shall be construed to deprive a person in military service or his heirs or devisees of any benefits to which he or they may be entitled under the Act entitled "An Act for the relief of homestead entrymen or settlers who enter the military or naval service of the United States in time of war" approved July twenty-eighth, nineteen hundred and seventeen; the Act entitled "An Act for the protection of desert-land entrymen who enter the military or naval service of the United States in time of war" approved August seventh, nineteen hundred seventeen; the Act entitled "An Act to provide further for

the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products" approved August tenth nineteen hundred seventeen; the joint resolution "To relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men, from performing assessment work during the term of such service" approved July seventeenth, nineteen hundred and seventeen; or any other Act or resolution of Congress: *Provided*, That nothing in this section contained shall be construed to limit or affect the right of a person in the military service to take any action during his term of service that may be authorized by law, or the regulations of the Interior Department thereunder, for the perfection, defense, or further assertion of rights initiated prior to the date of entering military service, and it shall be lawful for any person while in military service to make any affidavit or submit any rproof that may be required by law, or the practice of the General Land Office in connection with the entry, perfection, defense or further assertion of any rights initiated prior to entering military service before the officer in immediate command and holding a commission in the branch of the service in which the party is engaged, which affidavits shall be as binding in law and with like penalties as if taken before the Register of the United States Land Office (— Stat. L., —).

* * * * *

ARTICLE VI.

Administrative Remedies.

SEC. 600. (Transfers of Property, etc., with Intent to Delay—Effect on Power of Court to Ignore Provisions of Act.)—That where in any proceeding to enforce a civil right in any court it is made to appear to the satisfaction of the court that any interest, property, or contract has since

the date of the approval of this Act been transferred or acquired with intent to delay the just enforcement of such right by taking advantage of this Act, the court shall enter such judgment or make such order as might lawfully be entered or made the provisions of this Act to the contrary notwithstanding (— Stat L., —).

SEC. 601. (1) (Evidence of Military Service.)—That in any proceeding under this Act a certificate signed by the Adjutant General of the Army as to persons in the Army or in any branch of the United States service while serving pursuant to law with the Army, signed by the Chief of the Bureau of Navigation of the Navy Department as to persons in the Navy or in any other branch of the United States Service while serving pursuant to law with the Navy, and signed by the Major General, Commandant, United States Marine Corps, as to persons in the Marine Corps, or in any other branch of the United States service while serving pursuant to law with the Marine Corps, or signed by an officer designated by any of them respectively, for the purpose shall when produced be *prima facie* evidence as to any of the following facts stated in such certificate:

That a person named has not been, or is, or has been in military service; the time when and the place where such person entered military service, his residence at that time, and the rank, branch, and unit of such service that he entered, the dates within which he was in military service, the monthly pay received by such person at the date of issuing the certificate, the time when and place where such person died in or was discharged from such service.

It shall be the duty of the foregoing officers to furnish such certificate on application, and any such certificate when purporting to be signed by any one of such officers or by any person purporting upon the face of the certificate to have been so authorized shall be *prima facie* evidence of its contents and of the authority of the signer to issue the same (— Stat. L., —).

(2) (Continuance in Service—Missing or Dead Persons.)—Where a person in military service has been reported missing he shall be presumed to continue in the service until accounted for, and no period herein limited which begins or ends with the death of such person shall begin or end until the death of such person is in fact reported to or found by the Department of War or Navy, or any court or board thereof, or until such death is found by a court of competent jurisdiction: *Provided*, That no period herein limited which begins or ends with the death of such person shall be extended hereby beyond a period of six months after the termination of the war (— Stat. L., —).

SEC. 602. (Interlocutory Orders.)—That any interlocutory order made by any court under the provisions of this Act may, upon the court's own motion or otherwise, be revoked, modified, or extended by it upon such notice to the parties affected as it may require (— Stat. L., —).

SEC. 603. (Termination of Act.)—That this Act shall remain in force until the termination of the war, and for six months thereafter: *Provided*, That wherever under any section or provision of this Act a proceeding, remedy, privilege, stay, limitation, accounting or other transaction has been authorized or provided, the due exercise or enjoyment of which may extend beyond the period herein fixed for the termination of this Act, such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of the proceeding, remedy, privilege, stay, limitation, accounting or transaction aforesaid (— Stat. L., —).

SEC. 604. (Name of Act.)—That this Act may be cited as the Soldiers' and Sailors' Civil Relief Act (— Stat. L., —).

EXHIBIT 3.

Filed April 27, 1923.

STATE OF MICHIGAN SUPREME COURT.

Dr. HARRY P. POSTON, *Plaintiff*,

vs.

EDMUND L. EBERT, ANDREW J. KEARY, and ELLA R. KEARY,
Defendants.

Before the Entire Bench.

Per Curiam:

A motion for rehearing has been filed. In it constitutional questions are discussed which were not urged in the original brief. Under numerous decisions of this court, constitutional questions may not be raised for the first time on motion for rehearing. It is also made to appear that the lots involved have been sold and substantial houses erected on them. The purchasers, however, are not before us. They are in possession. Unless the parties come to an adjustment, we may assume plaintiff will bring ejectment to recover possession. In such action the question of whether such purchasers are entitled to the benefits of sections 13211 *et seq.*, C. L., 1915, and if so to what extent, will be before the court. Such purchasers not being parties to this proceeding their rights can not be here adjudicated. The motion for rehearing will be denied.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, A. D. 1923.

No.

EDMUND L. EBERT, ANDREW J. KEARY, AND ELLA
B. KEARY, PETITIONERS,

v.s.

DR. HARRY P. POSTON, RESPONDENT.

BRIEF ON PETITION FOR CERTIORARI.

The Facts.

As outlined in the petition, Dr. Harry P. Poston, in May, 1917, purchased some building lots located in Hamtramck, Michigan. At the time these were subject to a mortgage which he assumed and agreed to pay. He defaulted in his payments and on February 5, 1918, under a power of sale contained in the mortgage, the lots were sold and purchased by the petitioners, Mr. and Mrs. Keary. On the same day a deed was given them by the Sheriff, recorded and placed in the custody of the Register of Deeds of the county. On

March 8, 1918, one month and three days after this sale the Congress of the United States passed the "Soldiers' and Sailors' Civil Relief Act." On September 29, 1918, the respondent entered service in the army of the United States. On February 5, 1919, the period of redemption under Michigan law expired. On May 14, 1919, the respondent received his honorable discharge from the service. On his return to Detroit, after this and in July, 1919, he began and carried on some negotiations with the petitioner Ebert, looking to a settlement. Nothing came of these and on November 19, 1919, he made a tender of a sufficient amount of money and asked for the return to him of the lots. This tender was refused and subsequently this suit was instituted.

The bill of complaint claimed Dr. Harry Poston was protected by the provisions of the "Soldiers' and Sailors' Civil Relief Act" which had prevented the period of redemption from expiring, and had extended this period for the full time he had spent in the service. The Circuit Court for the County of Wayne held against the respondent's contention and the matter was appealed to the Supreme Court of Michigan. This court reversed the decree of the lower court and entered a decree in favor of the respondent, in accordance with the prayer of his original bill.

The facts present two questions:

(1) The law being a Federal enactment, a certain scope and meaning is given to it by the Supreme Court of Michigan. Is this correct?

(2) Is a petition for a writ of certiorari the proper procedure under section 237 of the Judicial Code, as amended in 1916, by 39 Statute at Large, 726?

For convenience the second question will be first treated:

Is a petition for a writ of certiorari the proper procedure under section 237 of the Judicial Code, as amended in 1916 by 39 Statute at Large, 726?

As shown by the petition the allegations of the seventh paragraph of the original bill, its prayer for relief and the answer to these, contain statements and allegations which, when coupled with the decree of the Michigan Supreme Court, show that from the very beginning the respondent "especially set up and claimed," under a statute of the United States, a certain privilege or immunity and thus the matter is and was brought within that part of the Judicial Code, section 237 as amended by the Act of September 6, 1916, which reads as follows:

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there shall be certified to it for review and determination any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question * * *; or where any title, right, privilege or immunity is claimed under * * * statute of * * * the United States and the decision is either in favor of or against the title, right, privilege or immunity, especially set up or claimed by either party under such * * * statute * * *."

As to what is a privilege or immunity under this statute see:

Nutt vs. Knut, 200 U. S., 12.

As to procedure:

Erie R. R. Co. vs. Hamilton, 248 U. S., 369.

The Law Being a Federal Enactment, a Certain Scope and Meaning is Given to it by the Supreme Court of Michigan. Is This Correct?

The opinion of the Michigan Supreme Court rests upon the theory (1) that the right or privilege given by the Michigan statute to redeem from a mortgage foreclosure sale by advertisement, within one year of the sale, is a civil right or limitation, and (2) while not expressly referred to in the "Soldiers' and Sailors' Civil Relief Act," this right or privilege is within the "spirit" if not within the "letter" of that statute, and (3) that the period of military service, under section 205 of the Federal act must be added to the period of redemption fixed by Michigan law.

It will be almost universally admitted that in fixing the meaning of a statute its "spirit" is not to be invoked if the "letter" is clear and unambiguous. We submit that the letter of this statute is without ambiguity and that there is no occasion to invoke its spirit.

Section 302 of this act concerns itself with "secured obligations." It has three paragraphs:

Paragraph 1 outlines and defines the obligations to which it shall apply.

Paragraph 2 confers jurisdiction on courts and authorizes a "stay."

Paragraph 3 makes a sale "under a power of sale * * * contained in any such obligation, 'invalid,' if made during the period of military service." The words of this statute "secured obligations," "power of sale * * * contained in any such obligation," taken with the rest of the context, indicate very clearly that the act is here dealing with mort-

gages on real estate. Nothing could be plainer, and under these circumstances the words of the law ought to be sufficient to determine the rights given or withheld respecting these obligations.

U. S. *vs.* Goldenberg, 168 U. S., 102.

Louisville & Nashville Railway Co. *vs.* Mottley, 219 U. S., 467.

United States *vs.* Ewing, 237 U. S., 197.

The obligations mentioned in the third paragraph are the same as those named in the first and the law applies in its own words "only to obligations originating prior to the date of the approval of this act." This mortgage is dated September 25, 1916 and is consequently within this language. The paragraph continues "and secured by mortgage * * * on real property owned by a person in military service and still so owned by him." (Presumably, "still so owned by him" means, not March 8, 1918, the date of the act, but owned by him while in the service and when action is taken respecting it.)

The facts in the case here presented are *not* within this language.

Dr. Poston did not own the real estate pledged in this mortgage on March 8, 1918, and he did not own it at any time during his military service. The real estate had been sold by the sheriff of Wayne County on February 5, 1918. The doctor's personal debt, his personal liability and the mortgage which covered these had been extinguished by this sale.

Wood *vs.* Button, 205 Mich., 692, 701, 706.

Power *vs.* Golden Lumber Co., 43 Mich., 468.

The purchaser at this sale acquired an inchoate title, subject to be defeated by redemption. If not defeated his title would relate back to the time of the purchase.

Stout vs. Keys (Mich.), 2 Douglas, 184.

The mortgagor's status, as noted, was also changed. He acquired what "has always, under our law been regarded as practically a legal estate."

Hoffman vs. Harrington, 33 Mich., 392, 394.

He acquired a right which he was free to exercise or not, just as he pleased. There was no obligation on him to act under this right. He could not be forced to act under it. He had one year in which to make up his mind. On the sale of the property the offer to him came into existence, and with it certain property rights which ordinarily his mortgage contract would not give him. He was in possession, without obligation to account for rents, pay taxes or keep up insurance. This estate given him by law is an interest in land and can pass from him only by a written document.

Haak Lumber Co. vs. Crothers, 146 Mich., 575, 578.

In consequence before this law was placed upon the statute books both parties had a fixed estate and this was not a "remedy;" it was not a "limitation." It had to do with property rights as distinguished from civil rights and the question arises could the public (Congress) change or alter either of these estates without the consent of the parties, and injure one or lessen the estate of one without providing for compensation for the injured or the lessened estate?

The doubt which must necessarily arise in answering this

question brings us back forcibly to this inquiry. Is this situation in any wise covered by the Act of Congress?

When Congress acted this transaction was in the past. It had transpired. Ordinarily the law would not be held to reach it, unless the words of the statute made this intent very clear.

Schwab vs. Doyle, 258 U. S., 529, 534.

Not only is the situation here presented not covered by the law, but its absence from it is so conspicuous that this fact should invoke commanding attention in attempting to discover the meaning of the statute. Let us proceed on this point.

An equity of redemption exists in connection with every mortgage.

Parker vs. Dacres, 130 U. S., 43, 47.

In addition to this many States have provided by statute for a period of redemption after sale. The language of paragraph 3, section 302 leaves no doubt that it was not forgetfulness or ignorance or inadvertence, which caused no mention in express terms of "equity of redemption" or "period of redemption." Neither, as far as it was desired to cover them, are forgotten or ignored.

Very little is missing from this statute; almost every conceivable relation is covered by it—this is done systematically and with thoroughness. Let us illustrate:

After article 1, which contains the preamble and general purposes of the legislation:

Section 200 deals with default judgment from entry, the affidavits necessary and the setting aside or opening of all judgments.

Section 201, a general staying of proceedings in court.

Section 202, staying of a fine or penalty on account of contract stayed by this Act.

Section 203 stays execution of judgments, attachments and garnishments.

Section 204 permits actions to proceed as to codefendants.

Section 205 adds the period of military service to any statute of limitations.

Section 300 stays eviction, payment of rent and provides for an allotment of pay for rent.

Section 301 covers installments on property sold or leased and stays the rescission of contracts and the penalty for violation of contracts and confers jurisdiction on courts respecting these contracts.

Section 302 has already been referred to.

Section 400 covers insurance policies and premiums.

Section 401, the duties of the War Risk Insurance Bureau.

Section 402 defines the policies protected.

Section 403 requires a listing of applicants.

Section 404, for the rejection of applicants who apply for policies in excess of \$5,000.00.

Section 405 stays forfeiture of policies for nonpayment of premiums.

Section 406 requires reports by insurance companies and insurance associations.

Section 407, for a verification by bureaus of War Risk Insurance.

Section 408 requires United States bonds to be delivered to the insurer to make up the losses of the insurance.

Section 409 provides that these bonds are to be held as security for defaulted premiums.

Section 410 specifies deductions in the event of death of insured.

Section 411 fixes time for action after period of service.

Section 412 provides for an account between the United States and the insurer and for items of credit.

Section 413 provides for the surrender of the bonds on payment to the insurer by the United States.

Section 414 covers the policies to which the Act does not apply.

Section 415, the insurers to which the Act shall apply.

Section 500 covers taxes and assessments falling due during the period of service; stays the enforcement of collection and provides for the redemption of property sold or forfeited for the nonpayment of taxes, and fixes the maximum penalty.

Section 501 prevents loss or prejudice because of the absence from public lands from those who entered thereon.

Section 600 provides for proceedings to prevent fraudulent use of the act.

Section 601, for the evidence of military service, rights of missing or dead persons.

Section 602, jurisdiction in a court to revoke any interlocutory order.

Section 603, defining the time of termination or the period of continuance of the Act.

Surely the conclusion is natural that it was not the intention of Congress to include something which was not within this mass of detail. When the expression is used that "the equity of redemption" or the "period of redemption" is not in express terms covered by this Act, a literal truth is spoken, but if no effort is made to go beyond this the whole truth is not presented.

Turn back to Section 302 and consider the third paragraph. It absolutely "stays" the operation of any power of sale, except upon order of court. This absolute "stay" of the power of sale disposes of both "equity of redemption" and "period of redemption." This is so because:

In all of those states which have not provided for a period of redemption after sale, the equity of redemption lasts until the sale; hence if you may not operate under a power of sale in those states during the period of military service, the equity of redemption period cannot begin and of course cannot terminate. On the other hand in those states where the period of redemption comes after the date of sale if you cannot operate at all under that power of sale, the period of redemption will never start.

It was the purpose and intention of the draftsman of this act to cover the subject of "redemption" by the provision of paragraph 3 of Section 302. It is covered by it and thoroughly covered by it. It was probably, in his judgment, not possible legally to cover a situation where the rights of the parties under the exercise of a power of sale had become fixed, before the law had an existence. Hence the appropriateness here of the legal maxim: "The expression of one thing is the exclusion of all others." *Johnson vs. Southern Railway*, 17 Fed., 462, 466.

This mortgage, having passed out of existence before the act came into effect, is not covered by Section 302. This period of redemption, having started before the act was passed, is not covered by paragraph 3 of Section 302. The act having designedly, by staying the power of sale, covered this question of "redemption," a right or privilege beyond this should not be forced into the act by another Section which makes it and this section incongruous.

The Michigan court, to use the words of the opinion, said, "The act does not in precise terms refer to a limitation or foreclosure such as this" but because of what the court concluded was the intent of the lawmakers, it held the act to apply.

When you attempt to fit the facts of this case to this view of this law you are met with very serious problems, and these only emphasize the position already herein taken. The right to redeem expired February 5, 1919. Michigan's conclusion is that this right was extended for the period of military service by Section 205. Why not by 204, or 302 or 301 or 500? Any of these will fit the facts as well as 205, because 205 says "that the period of military service shall not be included in computing any period * * * limited by any law for the bringing of any action by or against any person in military service." No action was brought. The sale happened 33 days before the Act was passed and 7 months and 22 days before the Doctor entered the service. This language of Section 205 and these facts obviously have no relation to one another. Here was a right or privilege, an estate in land, in existence at the time of the passage of this act. It was not a limitation, nor was it a remedy as we understand these words. It was a fixed estate, an interest in real property and the very fact that such a section as 205 is selected to grant the relief leads very effectively to the conclusion that this law was never intended to apply to such a situation as these facts present.

We submit there should be a reversal of the conclusion reached by the Michigan Supreme Court.

P. J. M. HALLY,
Counsel for Petitioners.

SUBJECT INDEX

	Pages
Statement of the Case.....	1-3
Error relief on.....	3
Brief of argument.....	3-4
Federal statute not ambiguous.....	4
Property not "owned" by respondent.....	6
Status of parties after sale.....	7-11
"Redemption" covered by the statute.....	11-13
Power of sale exhausted.....	14
State decisions on the statute.....	16
The facts not within the law.....	17-18
Resume	18
Mich. statute on foreclosure of mortgages by advertisement	19-23

CASES

Belle vs. Buffinton, 137 N. E. (Mass.) 287.....	16
Brownson vs. Kunzie, 1 How. 311.....	10
11 Corpus Juris, 398.....	9
Conn. Mutual Life Insurance Co. vs. Cushman.....	3,6,10
Etheridge vs. Sperry, 139 U. S. 266, 277.....	9
Haak Lumber Company vs. Crothers, 146 Mich. 575	8
Heydenfeldt vs. Daney Gold Mining Co. 93 U. S. 634	15
Holy Trinity Church vs. U. S. 143 U. S. 457.....	15
John Hancock Mut. Ins. Co. vs. Lester, 234 Mass. 559	16
Jones—Chattel Mortgages (3rd. Ed.) 654 . 684..	9
Jones—Mortgages (5th. Ed.) Sec. 1051.....	4,12
Morse vs. Stober, 233 Mass. 223.....	16
Ozawa vs. U. S. 260 U. S. 178.....	14

J42966

	Pages
Parker vs. Dacres, 130 U. S. 43.....	4,12
Powers vs. Golden Lumber Co., 43 Mich. 468.....	3,6
Schwab vs. Doyle, 258 U. S. 529, 534.....	11
Stewart vs. Kahn, 11 Wall. 493.....	14
Taylor vs. McGregor State Bank, 144 Minn. 249....	16
United States vs. Com. etc., Trust Company, 193 U. S. 651	4,8
United States vs. Ewing, 237 U. S. 197.....	3,5
United States vs. Goldenberg, 168 U. S. 95, 103....	16
Wagar vs. Stone, 36 Mich. 364.....	8
Walton vs. Hollywood, 47 Mich. 385.....	8,14
Wood vs. Button, 205 Mich. 692.....	3,6
Wood vs. Vogel, 204 Ala. 692.....	16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 153

EDMUND L. EBERT, ANDREW J. KEARY and
ELLA R. KEARY,

Petitioners,

vs.

DR. HARRY P. POSTON,

Respondent.

BRIEF FOR THE PETITIONERS

Doctor Harry P. Poston, in May 1917, purchased some building lots situated in Hamtramck, Michigan. (R. p. 30). At the time, they were subject to a mortgage held by Andrew J. Keary and Ella R. Keary, his wife, which he assumed and agreed to pay. (R. pp. 30, 66). Doctor Poston defaulted in his payments, and under a power of sale in the mortgage contract (R. pp. 75-77), and in accordance with the Michigan law, which regulates the

exercise of such power (Exhibit 1 hereof), the lots were sold at public auction on February 5, 1918, (R. p. 71), and purchased by the petitioners, Mr. and Mrs. Keary. They paid therefor the entire amount due on the mortgage, including interest and costs. (R. pp. 70-75). On the same date a deed was given them by the sheriff. (R. p. 70.) It was duly recorded and placed in the custody of the Register of Deeds of the county. (R. p. 74).

On March 8, 1918, one month and three days after this sale, Congress passed the "Soldiers' and Sailors' Civil Relief Act". On September 29, 1918, seven months and twenty-four days after the sale, Dr. Poston entered the service in the army of the United States. (R. pp. 30, 66). On February 5, 1919, the period of redemption under the Michigan law expired. (Exhibit 1 hereof, Sec. 11). On May 14, 1919, the respondent received his honorable discharge from the service. (R. pp. 31, 66), and on his return to Detroit, and in July 1919, began and carried on some negotiations with the petitioner Ebert, looking to a settlement. (R. p. 31). Nothing came of these negotiations, and on November 19, 1919, he made a formal tender of a sufficient sum of money and asked for the return to him of the lots. (R. pp. 32, 67). This tender was refused and on August 19, 1920, this suit was instituted by Doctor Poston. (R. p. 2). In his bill of complaint he took the position that the provisions of the "Soldiers' and Sailors' Civil Relief Act" had prevented the period of redemption from expiring and had extended it for the full time he had spent in service. (R. p. 6). The Circuit Court of the County of Wayne, in which the suit first came to trial, held against this contention (R. pp. 62-64) and the matter was appealed by the Doctor to the

Supreme Court of Michigan. The latter court reversed the decree of the lower court and entered a decree in favor of the respondent in accordance with the prayer of his original Bill. (R. pp. 80-86). It did so, because in its opinion the provisions and general scope of the "Soldiers' and Sailors' Civil Relief Act" required this determination. Application was then made to the Supreme Court of the United States to review this decision and a petition for certiorari was filed August 20, 1923. The certiorari was granted December 11, 1923. (R. cover).

The sole question is: Is the position taken by the Michigan court correct? In the argument we oppose this position.

1. Because there is no ambiguity in Sections 205 and 302 of the Act of Congress.

(Federal Statutes Annotated—Supp. 1918, p. 812, Petition for Certiorari 15-35).

United States vs. Ewing, 237 U.S. 197.

2. Because neither the mortgage in question (Exhibit C, R. p. 75), nor the power of sale given by it are covered by the Act of Congress.

3. Because the property in question (Exhibit C, R. p. 75), was not "owned" by the mortgagor, nor subject to any mortgage, when the congressional act was passed.

Wood vs. Button, 205 Mich. 692, 701, 706;

Powers vs. Golden Lumber Co., 43 Mich. 468;

Conn. Mutual Life Insurance Co. vs. Cushman,
108 U. S. 51;

U. S. vs. Com. Etc., Trust Company, 193 U. S. 651.

4. Because the subject of redemption is covered by the congressional statute and in such a way as to demonstrate that the facts of this case are not within its terms.

Parker vs. Dacres, 130 U. S. 43;

Jones—Mortgages (5th. Ed.) Sec. 1051.

Sale held February 5, 1918—(R. p. 71).

Statute passed March 8, 1918—see above Military Service began September 29, 1918, (R. pp. 30, 66).

The opinion of the Michigan Supreme Court rests upon the theory that the right or privilege given by the Michigan statute to redeem from such a mortgage foreclosure sale, within one year of the sale, is a civil right or limitation, and that, while not expressly referred to in the "Soldiers' and Sailors' Civil Relief Act," this civil right or limitation is within the spirit, if not within the letter of that statute, and that the period of military service under Section 205 of the Federal Act must be added to the period of redemption fixed by Michigan statute law.

We submit that the letter of this statute is without ambiguity and in consequence there is no occasion to invoke its spirit.

Section 302 covers "secured obligations". (Petition for writ of certiorari 23). It has three paragraphs:

Paragraph 1 outlines and defines the obligations to which the act applies.

Paragraph 2 confers jurisdiction upon the courts, on its own motion or on application to it by a person in the military service "in any proceedings commenced in any court during the period of military service" to grant (a) a stay of the proceedings, or (b) make such disposition of the sale as may equitably conserve the interests of the parties.

Paragraph 3 forbids a sale under a power of sale or under a judgment entered if made during the period of military service, or within three months thereafter.

The language and its direct reference to "secured obligations" taken with the rest of the context, indicate very clearly that the act is here dealing with mortgages on real and personal property. There is no uncertainty or ambiguity in its meaning, and in consequence, it in itself is sufficient to determine the rights given or withheld respecting these kind of obligations.

United States vs. Ewing, 237 U. S. 197.

The mortgage here in question is dated September 25th, 1916. This fact would bring it within the language of the first and third paragraphs of Section 302. No one ever questioned this. It is one of the kind of "obligations" there referred to. Notwithstanding this, it is not covered by this section, because the words of the section in paragraph 1 exclude it. The paragraph reads as follows:

"Sec. 302. (1). (Secured obligations). That the provisions of this section shall apply only to obligations originating prior to the date of the approval of this Act and secured by mortgage, trust

deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of military service and still so owned by him."

No distinction is made between mortgages on real and personal property. The Act applies with equal force to either if the secured obligation is on real or personal property "owned * * * at the commencement of the period of military service and still so owned."

To own or "owned" undoubtedly have, depending on the context and purpose of the legislature, a variety of limited meanings. In this statute Congress seeks to protect the interest of a soldier or sailor in property subject to a mortgage. Hence the word "owned" must refer to that kind of a title which is ordinarily in the mortgagor. Such an estate as would give security for a debt, and which could be sold and permanently pass to another, if the debt was not paid.

The facts in the case here presented are not within this language. The real estate pledged in this mortgage was not "owned" by Doctor Poston on March 8, 1918, nor was it "owned" by him at the commencement of the period of military service, which, in his case, was September 29, 1918. The real estate had been sold by the sheriff of Wayne County February 5, 1918. The Doctor's personal debt, his personal liability and the mortgage which covered these had been extinguished by this sale.

Wood vs. Button, 205 Mich., 692, 701, 706,
Power vs. Golden Lumber Co., 43 Mich., 468,
Connecticut Mutual Life Insurance Co. vs. Cush-
man, 108 U. S., 51.

While the facts in the last named citation are not identical with the case presented by the petitioners, there is enough of similarity to make the conclusions of the Court exceedingly pertinent.

The Insurance Company loaned W. H. W. Cushman Seventy-five Thousand Dollars on property located in Chicago, Illinois. The property was subsequently conveyed, subject to this mortgage, to W. H. Cushman; and after this conveyance the mortgage foreclosed. The law at the time of its execution gave the mortgagor about fifteen months in which to redeem and permitted the purchaser at the foreclosure sale to collect interest at the rate of ten per cent on the amount of his bid. A subsequent law reduced this percentage to nine per cent. After the sale, and during the period of redemption, Cushman offered to redeem. The company protested his redemption on several grounds, among them the change in the law as an impairment of its contract. The Court analyzes and defines the position of the parties when the sale was made, on page 64, as follows:

"The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The Company ceased to be a mortgagee when its debt was merged in the decree, or at least when the sale occurred. Thence forward its interest in the property was as purchaser, not as mortgagee."

If Doctor Poston had sold this property on February 5, 1918, no one would think of arguing that he still "owned" it thirty-three days after when Congress acted.

Because the sale actually took place, with his consent, as given and expressed in his mortgage contract, by action of the sheriff under the law, does this fact justify the argument and force the conclusion that within the meaning of this statute that property was still "owned" by him?

It is true he still had an interest in the land. An interest given him by law. He could remain in possession for one year, take the rents and profits,

Wagar vs. Stone, 36 Mich., 364, 366,

pay no taxes or insurance,

Walton vs. Hollywood, 47 Mich., 385,

and what interest remained to him could pass from him only by a written instrument,

Haak Lumber Co. vs. Crothers, 146 Mich., 575, 578,

but his former estate, the estate essential to ownership in the ordinary meaning of the term was gone. It had passed to the purchaser at the sale,

United States vs. Com. Etc. Trust Co., 193 U. S., 651,

and he could recover it in only one way, and that was by a payment in full within one year from the date of the sale. Unless the context warrants it, property so held is not referred to as property "owned."

Reference has already been made to the fact that the statute in question makes no distinction between mortgages on real and personal property. Perhaps some light

on its interpretation can be gained from a brief consideration of law on chattel mortgages. The rights given or withheld by these instruments generally are of each state's determination.

"They are instruments for the transfer of property, and the rules concerning the transfer of property are primarily, at least, a matter of state regulation. We are aware that there is great diversity in the rulings on this question by the courts of the several states; but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any sale arising therein."

Etheridge vs. Sperry, 139 U. S., 266, 277.

Many states hold that a chattel mortgage is a conveyance of the property to the mortgagee which becomes absolute on default. Others that it is merely a lien and title does not rest except on some form of foreclosure,

11 *Corpus Juris*, 398, Et. seq.

However, in either group, a sale settles the state of the title and on redemption proceedings—given by the decisions or statutes of the state—if the mortgagee has disposed of the property or converted it to his own use, the mortgagor is left to recover its value.

Jones—Chattel Mortgages (3rd Ed.), 684.

If the mortgage here in question was a chattel mortgage and a foreclosure sale had taken place on February 5, 1918, could anyone successfully contend that this mortgage was one of the "secured obligations" about which Congress was legislating thirty-three days after this sale or that the property covered by it was "owned" by the respondent "at the commencement of the period of military service and still so owned by him"?

We invoke another consideration:

The sale of February 5, 1918, changed the status of these parties. They were no longer under their former contract.

Conn. Mutual Life Insurance Company vs. Cushman, 108 U. S., 51.

The interest or right given by law to the one, and the estate procured by the other, the purchaser, became fixed and definite. While their respective interest grew out of their contract relationship, because of the law in existence when this contract was made,

Brownson vs. Kunzie, 1 Howard, 311,

nevertheless these interests were fixed and definite. They were property rights as distinguished from civil rights. Neither could be properly referred to as a "remedy" or a "limitation." And the question arises: Would Congress change or alter either of these estates without the consent of the parties and injure one or lessen the estate of one without providing for compensation for the injured or the lessened estate?

No one questions the power of Congress to pass the "Soldiers' and Sailors' Civil Relief Act." If in the legislative judgment this was a necessary measure for the successful prosecution of the war, its power could not be questioned. But in seeking to find the meaning of one of its enactments, property rights will not be deemed to be interfered with unless this intent is clearly indicated. When Congress acted this transaction was in the past. It had transpired and the ordinary law is prospective in its operation unless a different intent appears from the words employed.

Schwab vs. Doyle, 258 U. S., 529, 534.

Not only is the situation here presented not covered by the law, but its absence from it is so conspicuous that this fact should invoke commanding attention in defining the meaning of this statute.

The respondent has insisted that this subject of extending the period of redemption was an important subject and that it was the intention of Congress to cover this, as well as any other subject matter about which it was necessary to protect a soldier's interest, and that the inadvertence of not making reference directly to this period of redemption does not exclude it because of its ample inclusion in other portions of the statute. Nothing in the facts and nothing in the statute warrant any such argument. Congress cannot be presumed to be ignorant of the situation which prevails due to the various laws upon this question in the various States of the Union.

An equity of redemption exists in connection with every mortgage.

Parker vs. Dacres, 130 U. S., 43, 47.

In addition to this, many States have provided by statute for a period of redemption after sale.

Jones—Mortgages (5th Ed.), Sec. 1051.

The language of paragraph 3, Section 302, leaves no doubt that neither redemption after sale nor equity of redemption were forgotten. There was no ignorance and no inadvertence on this subject. Neither the one nor the other were forgotten or ignored. It is true when you say that "the equity of redemption" or "the period of redemption" is not, in expressed terms, covered by the Act, a literal truth is spoken, but if no analysis is made of paragraphs 2 and 3, Section 302, the whole truth is not presented.

Paragraph 2 as already pointed out, gives a court jurisdiction and authority on its own motion, or on application of a person in the military service, or of some one on his behalf "in any proceeding commenced in any court during the period of military service to enforce such obligation arising out of non-payment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, (a) to stay the proceeding, or (b) make such other disposition as will equitably conserve the interests of the parties."

This paragraph was not invoked in this case. No court was asked to adjudicate upon this situation until one year and three months after the period of military service had terminated.

Paragraph 3 provides that no sale shall be valid if made during the period of military service, or within three months thereafter, except under a certain condition set forth in the statute. Now—

First. At the time this sale took place no law gave the Court the jurisdiction here spoken of.

Second. Both the period of redemption and the equity of redemption are covered by this statute.

Third. The manner in which they are covered show that the facts in this case are outside of this statute.

The language of this paragraph provides that no sale under a power of sale, and no sale under a judgment entered shall be valid except under certain conditions. In mentioning these two methods of foreclosure, the whole subject is covered. In those States where the period of redemption is given by statute law, it does not start until the sale is had. In those States where there is no period of redemption given by statute law, the equity of redemption terminates with the sale. Consequently by forbidding a sale, in either case (except on conditions not here important, because this law was not then in existence) the period of redemption in those States which give it, by statute law, it could not begin until three months after the termination of the period of military service, while the equity of redemption, which would end with the sale, would not terminate until three months after the termination of the period of military service. From this we argue that both the period of redemption and the equity of redemption are covered by paragraph 3, section 302. If a sale took place before the

law came into existence and that sale fixed the rights of the parties, that sale is outside of this statute and the parties interested in that sale are outside the protection given by this statute.

This mortgage having passed out of existence before the Act came into effect, is not covered by Section 302. The power of sale having been exhausted before the Act came into effect is not covered by Section 302.

Walton vs. Hollywood, 47 Mich., 385, 389.

The period of redemption in this case given by the Michigan statute having started before the Act was passed, is not covered by Section 302. The Act having designedly, by staying the power of sale in all cases, covered the whole subject of redemption, a supposed right resting on what is thought to be the intent of the lawmakers, should not be forced into the Act by a reference to some section which would make the section referred to and Section 302 incongruous.

The Michigan Supreme Court, after quoting Sections 205 and 302, said "But we think the Act should be construed liberally to accomplish the congressional purpose indicated in the Section quoted". (R. p. 82). The Section quoted from the context means Section 205. Excerpts from two cases in the Supreme Court of the United States are used to justify this interpretation.

Stewart vs. Kahn, 11 Wall. 493;

Ozawa vs. United States, 260 U. S. 178.

In *Stewart vs. Kahn*, the court had before it an Act of Congress, passed June 11, 1864, "in relation to the limita-

tion of actions in certain cases", and held it was not prospective alone in its operation, but applied to all cases where the plaintiff could not prosecute his suit by reason of the rebellion.

In *Ozawa vs. United States* the court had under consideration two separate statutes applying to naturalization, to-wit, the Naturalization Act of June 29, 1906, and Section 2169 of Revised Statutes. The contention was that the Act of June 29, 1906, was complete in itself and by implication repealed that provision of the other section which permitted naturalization only to "free white persons". The court in its disposition of the matter made use of the language quoted by the Michigan Supreme Court and refers to,

Holy Trinity Church vs. U. S. 143 U. S. 457;
Heydenfeldt vs. Daney Gold Mining Company,
 93 U. S. 634.

None of the cases cited extend the power of interpretation as far as the Michigan Supreme Court did in this case. No one questions the right of the court to ascertain from the whole Act the legislative intent as that intent appears from a consideration of the whole Act, nor does anyone contend that words may not be suppressed or given a meaning consonant with the purpose of the legislation. Mr. Justice Brewer, who delivered the opinion of the court in the Holy Trinity case, found occasion later to again discuss this question, when he said—"It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional and only arise where there are cogent reasons for believing that the

letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute".

United States vs. Goldenberg, 168 U. S. 95, 103.

If the statute here in question had not mentioned the subject of mortgages and contained general language which obscurely applied to them and other matters, from such general language a court could rightfully say mortgages were covered. But when in the face of Section 302 (secured obligations) and a mortgage which it is admitted does not come within the language of this Section, a court forces this mortgage into Section 205, and in doing so ignores the express and implied meaning of that Section, it is, we submit, evidently of the opinion that (to paraphrase the language of Mr. Justice Brewer) this omission, this failure to provide for this contingency justifies a judicial addition to the language of the statute.

Massachusetts, Alabama and Minnesota construe this Act as not applying to mortgage sales had while the mortgagor was not in military service. The force of these decisions in petitioner's favor is augmented by the fact that the sales under consideration were held after the passage of the Act.

Belle vs. Buffinton, 137 N. E. (Mass.) 287;

Morse vs. Stober, 233 Mass. 223;

John Hancock Mut. Insurance Company vs.

Lester, 234 Mass. 559;

Wood vs. Vogel, 204 Ala. 692;

Taylor vs. McGregor State Bank, 144 Minn. 249.

The Michigan court, to use the words of the opinion, said: "The Act does not in precise terms refer to a limitation or foreclosure such as this", but because of what the court concluded was the intent of the lawmakers, it held the Act to apply. When you attempt to fit the facts of this case to this view of this law, you are met with very serious problems. These only emphasize the position herein taken. Under the Michigan law the right to redeem from this sale expired February 5, 1919, (Exhibit 1 hereof Dec. 11). Michigan's conclusion is that this right was extended for the period of the military service by Section 205. It might be asked, why not 204 or 302 or 301 or 500? Any one of these sections would fit as well as 205.

Section 204 gives jurisdiction over any stay ordered by any court under the provisions of this Act, and permits the modification thereof. Section 302 permits the stay already referred to. Section 301 provides for protection under contracts made for the purchase of real estate. Section 500 provides for the protection given when taxes and assessments fall due. Any of these will fit the facts as well as 205, because 205 says: "that the period of military service shall not be included in computing any period limited by any law for the bringing of any action by or against any person in military service".

No action was brought. The sale happened thirty-three days before the Act was passed, and seven months and twenty-two days before the Doctor entered the military service. These facts and this language of Section 205 obviously have no relation to one another. Here we are concerned with definite estates in land. The one possessed by the Doctor, and the one possessed by the purchaser at the

sale would not be referred to as a "limitation" in bringing any action in court, and the very fact that such a section as 205 is selected to grant the relief asked, leads very effectively to the conclusion that this law does not and was not intended to apply to such a situation as these facts present.

Inasmuch as from the foregoing, (1) the mortgage in question was no longer in existence when the Act of Congress was passed; (2) the property in question was not subject to any mortgage when the Act was passed; (3) the property in question was not "owned" by the respondent when the Act was passed; (4) the power of sale in the mortgage in question had been exhausted when the Act was passed; (5) there are no words in the statute to indicate that its provisions apply to completed transactions, and (6) the letter of the law is clear and unambiguous covering the whole subject of redemption, in such manner as to make it plain that the facts of this case are not within its terms, we ask for a reversal of the conclusions reached by the Michigan Supreme Court.

Thos J. Bresnahan,
Elmer H. Groefsema,
P. J. M. Hally,

Attorneys for Petitioners.

EXHIBIT 1.**COMPILED LAWS OF MICHIGAN, 1915.*****Chapter 249.—Foreclosure of Mortgages by Advertisement***

(14949.) **SECTION 1.** Every mortgage of real estate, containing therein a power of sale, upon default being made in any condition of such mortgage may be foreclosed by advertisement, in the cases and in the manner hereafter specified.

(14950.) **SEC. 2,** To entitle any party to give a notice as hereinafter prescribed, and to make such foreclosure, it shall be requisite:

1. That some default in a condition of such mortgage shall have occurred, by which the power to sell became operative;

2. That no suit or proceedings shall have been instituted at law, to recover the debt then remaining secured by such mortgage, or any part thereof; or if any suit or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied, in whole or in part; and

3. That the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned, that all the assignments thereof shall have been recorded;

4. In cases of mortgages given to secure the payment of money by installments, each of the installments mentioned in such mortgage after the first, shall be taken and deemed to be a separate and independent mortgage, and such mortgage for each of such installments may be foreclosed in the same manner, and with the like effect, as if such separate mortgages were given for each of such subsequent installments, and a redemption of any such sale by the mortgagor shall have the like effect as if the sale for such installments had been made upon an independent prior mortgage.

(14951.) SEC. 3. Notice that said mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for twelve successive weeks, at least once in each week, in a newspaper printed in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated, if there be one; and if no newspaper be printed in such county, then such notice shall be published in a paper published nearest thereto.

(14952.) SEC. 4. Every such notice shall specify:

1. The names of the mortgagor and of the mortgagee, and the assignee of the mortgage, if any;
2. The date of the mortgage, and when recorded;
3. The amount claimed to be due thereon at the date of the notice and
4. A description of the mortgaged premises, conforming substantially with that contained in the mortgage.

(14953.) SEC. 5. The sale shall be at public vendue, between the hour of nine o'clock in the forenoon and the setting of the sun, at the place of holding the circuit court within the county in which the premises to be sold, or some part of them, are situated, and shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, under sheriff, or a deputy sheriff of the county, to the highest bidder.

(14954.) SEC. 6. Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale shall be postponed, at the expense of the party requesting such postponement.

(14955.) SEC. 7. If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as one parcel, they shall be sold separately, and no more farms, tracts or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the costs and expenses allowed by law; but if distinct lots be occupied as one parcel, they may in such case be sold together.

(14956.) SEC. 8. The mortgagee, his assigns, or his or their legal representatives, may, fairly and in good faith, purchase the premises so advertised, or any part thereof, at such sale.

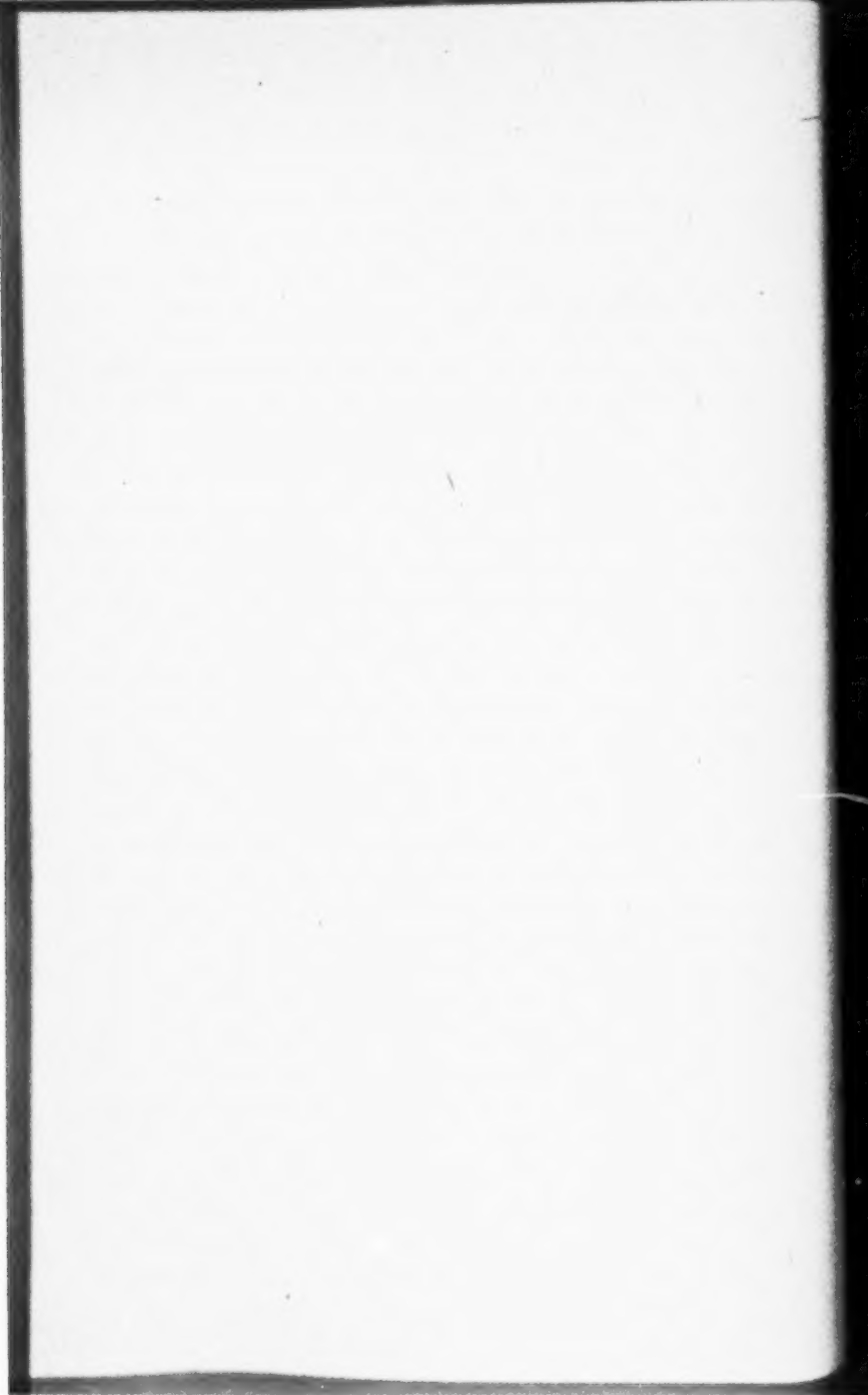
(14957.) SEC. 9. The officer or person making the sale shall forthwith execute, acknowledge, and deliver to each purchaser a deed of the premises bid off by him; and if the lands are situated in several counties, he shall make

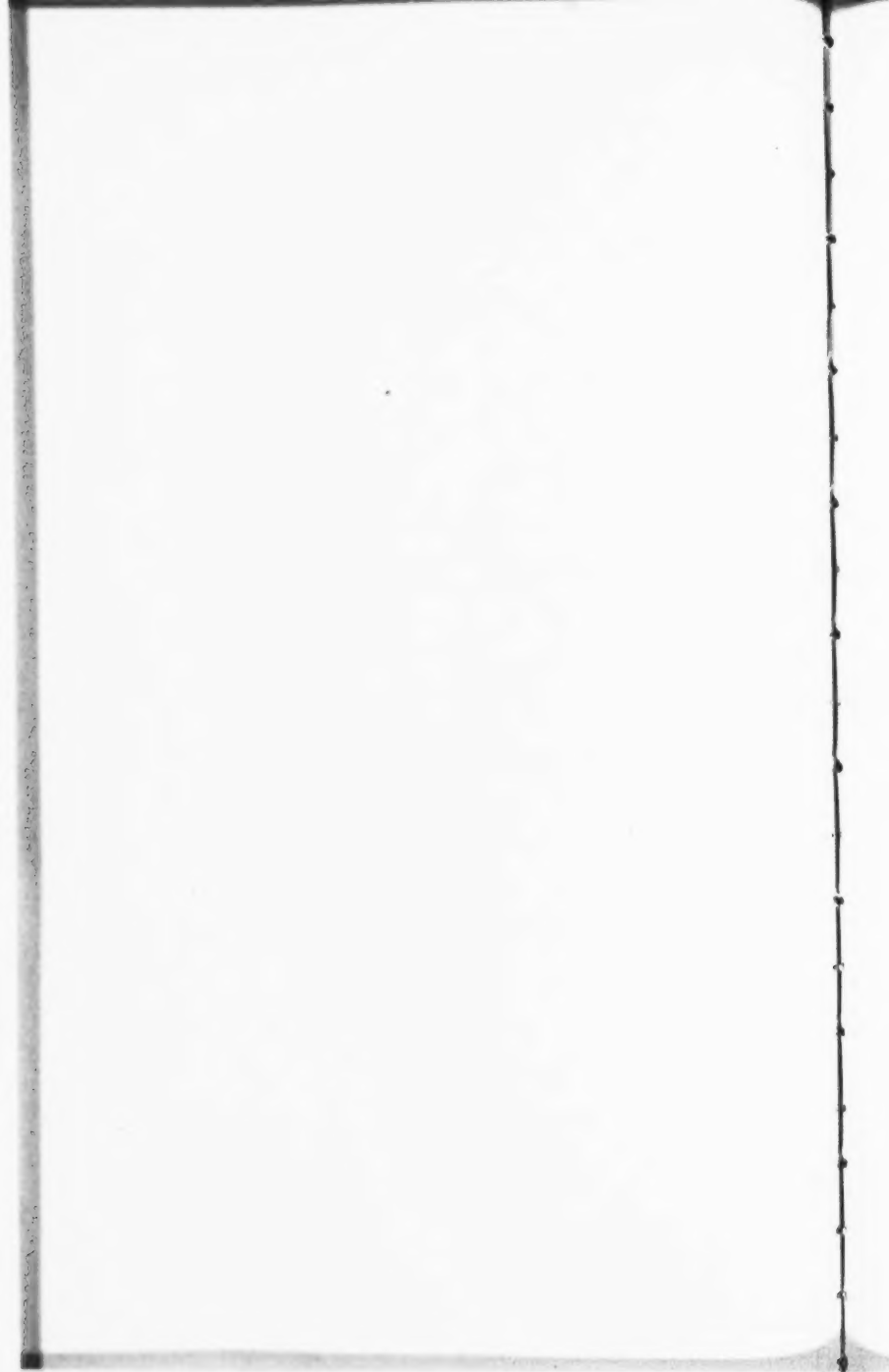
separate deeds of the lands in each county, and specify therein the precise amounts for which each parcel of land therein described was sold. And he shall indorse upon each deed the time when the same will become operative in case the premises are not redeemed according to law. Such deed or deeds shall, as soon as practicable, and within twenty days after such sale, be deposited with the register of deeds of the county in which the land therein described is situated, and the register shall indorse thereon the time the same was received, and for the better preservation thereof, shall record the same at length in a book to be provided in his office for that purpose, and shall index the same in the regular index of deeds; and the fee for recording the same shall be included among the other costs and expenses allowed by law. In case such premises shall be redeemed, the register of deeds shall, at the time of destroying such deed, as provided in section twelve of this chapter, write on the face of such record the word "Redeemed," stating at what date such entry is made, and signing such entry with his official signature.

(14958.) SEC. 10. Unless the premises described in such deed shall be redeemed within the time limited for such redemption, as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and cancelled, as hereinafter provided; and the record thereof shall thereafter, for all purposes, be deemed a valid record of said deed, without being re-recorded; but no person having any valid subsisting lien upon the mort-

gaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby.

(14959.) SEC. 11. If the mortgagor, his heirs, executors, administrators, or any person lawfully claiming from or under him or them, shall, within one year from the time of such sale, redeem the entire premises sold, by paying to the purchaser, his executors, administrators, or assigns, or to the register of deeds in whose office such deed is deposited, for the benefit of such purchaser, the sum which was bid therefor, with interest from the time of the sale at the rate per cent borne by the mortgage, not exceeding ten per cent per annum, and in case such payment is made to the register of deeds, the sum of one dollar as a fee for the care and custody of such redemption money, then such deed shall be void and of no effect; but in case any distinct lot or parcel separately sold shall be redeemed, leaving a portion of the premises unredeemed, then such deed shall be inoperative merely to the parcel or parcels so redeemed, and to those portions not so redeemed shall remain valid and of full effect.





Supreme Court of the United States

OCTOBER TERM, 1923

No. 512

EDMUND L. EBERT, ANDREW J. KEARY, AND
ELLA R. KEARY, PETITIONERS,

vs.

DR. HARRY P. POSTON, RESPONDENT.

PRINTED ARGUMENT AND BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

The statement of facts in the petition and brief of petitioners is substantially correct except that it is important to add, for reasons which will be more fully hereinafter emphasized, that on December 17th, 1919, notice of respondent's claim of rights had been recorded in the office of the Register of Deeds for Wayne County, Michigan (Ex. 7, R. 124).

The respondent's Bill of Complaint was founded upon the following theories:

I.

“There was no proof of a legal mortgage foreclosure by the petitioners.

II.

If the mortgage foreclosure sale was legal, the rights of plaintiff as of the date of his entry into military service on September 24th, 1918, were preserved to him by the provisions of the Soldiers and Sailors Civil Relief Act, so-called.

(a) Because of the provisions of Section 205 staying the running of the period for redemption.

(b) Because of Section 202 in that divesting plaintiff of his legal title by permitting the expiration of the redemption period while he was in military service would be a ‘penalty incurred while plaintiff was in the military service and his ability to pay was thereby materially impaired.’

(c) Because of Section 301 preventing defendants from terminating the contract or resuming possession of the property for non-payment, ‘during the period of such military service except by action in a court of competent jurisdiction.’

(d) Because of the provisions of Section 302, (2) read together with Section 301 (1), which by reason of defendants’ failure to comply therewith, prevented a court from exercising the equitable jurisdiction conferred by Section 302 (2) (a) (b).

(c) Because Sections 100 and 603 of the Soldiers and Sailors Civil Relief Act, read together with the provisions hereinbefore referred to, make it conclusively appear that the 'transaction' in question in this case, under a proper construction of the Act, comes within the protection of the Soldiers and Sailors Civil Relief Act.

III.

(a) Because this Michigan Court of Equity, under the established facts in this case, and under the Michigan decisions applying thereto, as well as under the special equitable jurisdiction conferred by the Soldiers and Sailors Civil Relief Act, has the power to give relief and should exercise it.

(b) Because the conduct of the defendants in negotiating for purchase by them from plaintiff of the property in question, constitutes a recognition of the mortgage as a continuing mortgage; a waiver of the foreclosure and an estoppel to set up the foreclosure."

It will appear from the foregoing that so-called Federal questions were not the sole ones which the Michigan Supreme Court passed upon, so that if its determination of the issues presented by respondent's Bill of Complaint as indicated by the decree signed by the Michigan Supreme Court, can stand independently of the Federal question as passed upon, this court should not issue a Writ of Certiorari.

Respondent insists:

(A) That the Michigan Supreme Court had jurisdiction of this cause and exercised it as shown *by its decree independently of any Federal Statute:*

(1) Because the conduct of the petitioners in negotiating for purchase by them from respondent of the property in question, constituted a recognition of the mortgage as a continuing mortgage; a waiver of the foreclosure and an estoppel to set up the foreclosure.

“Wiltse on Mortgage Foreclosures, 3rd Ed., Vol. 2, p. 1659.

‘Sec. 1255. Waiver.—The extinction by the running of the Statute of Limitations of the right of the mortgagor, or those claiming under him, to redeem, may be waived by an Act of the mortgagee, or the owner of the mortgage, which indicates a disclaimer of the foreclosure, and presumptively leaves the mortgage subject to redemption in equity; *such as doing any act which shows that the party treats the debt as still due, and the account as still open, and the extinguishment of the mortgagor’s equity affected by judicial action, is still subject to be waived by an admission on the part of the mortgagee.*

Sec. 1256. By Acknowledgment. — Any acknowledgment on the part of the mortgagee, or those in privity with him, of the right of the mortgagor to redeem, will prevent * * * the bar of redemption, *such as an admission of the existence of the debt, whether oral or in writing; * * * letter written containing admissions of the existence of the mortgage and of the rights of the mortgagor; * * * or rendering an account of the amount due on the mortgage debt’.*”

See also:

Williams v. Bolt, 170 Mich., 517. (See Ex. 11, R. 126).

Exhibit 11 is dated July 24th, 1919, and the material part reads as follows:

"Dear Sir:

Below please find figures showing *Amount due on Lots 32, 35, 37, 41, 43, 45 and 47, Sunnyside Subdivision, Mortgaged Sept. 25/16, by Eddie E. Hulett and wife.*

Interest is computed to Aug. 5, 1919, BUT DEDUCTION CAN BE MADE SHOULD PAYMENT BE MADE BEFORE THAT DATE.

Yours truly,

(Signed) A. J. Keary.

Due Aug. 5, 1919.....\$1,945.39."

(2) Because respondent's claims as set forth in his Bill of Complaint and supported by the testimony in the record, established sufficient facts to confer jurisdiction upon the Michigan Supreme Court to warrant the entering of the degree on file under the claim of respondent that before entering the military service, he was advised by counsel that he was protected by the Soldiers and Sailors Civil Relief Act, and that he relied thereon (R., p. 62).

Schroeder v. Young, 161 U. S., 334.

Hunt v. Rousmanier's, 8 Wheat 174, 215; 5 L.

Ed. 589, 600.

Millard v. Truax, 50 Mich., 343.

McIntyre v. Wyckoff, 119 Mich., 557.

Brown v. Burney, 129 Mich., 204.

Williams v. Bolt, 170 Mich., 517.

Dalton v. Weber, 203 Mich., 453.

Benson v. Bunting, 59 Pac. 991, (Calif).

* * * * *

Rule No. 3 of this court, provides:

“This court considers the former practice of the courts of kings bench and of chancery in England as affording outlines for the practice of this court.”

“He who comes into a Court of Equity must come with clean hands.”

This Court of Conscience and Equity will not steep and blacken its hands in the swamp and mire of inequity, fraud, conspiracy, and perjury of the petitioners in this cause in an effort to find equities for them.

Ex. G, R. 146, is dated December 18th, 1919, and purports to have been acknowledged on the same date, although not recorded until April 26th, 1920. The notary public in the acknowledgment gives the expiration of his commission as March 29th, 1924, a commission which he did not get from the Governor of Michigan until March 29th, 1920. The petitioners, Ebert and Keary, swear that the deed was executed and acknowledged, and the consideration delivered on December 18th, 1919 (Keary, R. 50, 52, 82; Ebert, R. 95).

This attempt to deceive the court by setting up petitioner Ebert as a *bona fide* purchaser for value without notice from petitioner Keary was abandoned by petitioners in their brief to the Michigan Supreme Court as commented upon in the opinion of the Michigan Supreme Court when they were so clearly caught red-handed in the fraudulent dating back of their deed.

It must be clear upon this record that Exhibit 11, written by the defendant Keary on July 24, 1919, five and one-half months after what the petitioners are now claiming was the expiration date of respondent's right

of redemption, was because of the belief on the part of the petitioners (probably on the advice of counsel), that the period of military service must be excluded in computing the time to redeem. This explains his subsequent conduct when the petitioner, Ebert, conceived and endeavored to carry into execution his fraudulent plan to appear to be negotiating to purchase the property from respondent so that in the interim and during that period the right to redeem might actually expire. The trial court and the Michigan Supreme Court found that this fraudulent conduct constitutes an estoppel in law.

The shameful manner in which petitioner sought to take advantage of the weakness in the Michigan statutory foreclosure by advertisement through power of sale clause mortgages (which is satisfied by advertisement in an obscure legal paper without registered mail notice or otherwise to the mortgagor or his assigns) is evident from the fact that while the petitioners notified respondent on September 1, 1917, when the mortgage was about to become due (Exhibit 4, R. 142), and notwithstanding they knew the doctor's address in the David Whitney building, they at no time notified him of the mortgage foreclosure, at which they themselves purchased the property. The first that the doctor knew of the mortgage foreclosure was in September, 1919, when he was in the military service, and he sent his friend, William W. Warren, to the office of Mr. Ebert to pay past due interest on the mortgage (Warren, R. 70).

At that time, therefore, as admitted by petitioners, they knew that the respondent was in the military service (Keary R., p. 85; Ebert R., p. 92).



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They knew of the existence of the Soldiers and Sailors Relief Act and of the moratorium thereunder. If they thought notwithstanding the soldier was in the military service, they should be permitted to have their mortgage foreclosure sale become absolute, there were provisions in the Relief Act, by which upon their application to the court therefor, the court would appoint an attorney to represent the absent soldier's rights. As was indicated by the Michigan Supreme Court in its opinion, evidently in that situation the court would not have permitted the mortgage foreclosure sale to become absolute, particularly where there is ample testimony in this record from which it could be found that, in the language of the Relief Act:

“By reason of such service the ability of such person to pay or perform was thereby materially impaired,” or “Unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service.”

Surely no one will contend that the government of the United States has done more for its world war soldiers than it should have done. Surely the protection which this court has given the respondent in this case is not more than the fundamentals of the most simple justice require. Surely this respondent doctor, urged by the call of generations of patriotic ancestors, identified with the history of the Nation since 1650, Governors and Judges, soldiers in every war, who enters the military service and makes the sacrifice entailed by leaving his wife and child as the recipients of the charity of friends and relatives, leaving and destroying a flourishing medi-

cal practice, should not be penalized by having an unmarried man, multi-millionaire land contract discount and mortgage loan shark by the name of Ebert, have the soldier respondent's property forfeited to him in his absence.

It must be borne in mind that the title of the mortgagor respondent in and to the property in question, notwithstanding petitioner's claim to the contrary, had in no whit changed, so far as the legal title was concerned, by the mortgage foreclosure sale under Michigan law, and that respondent's rights came within the meaning of the words of the Relief Act, and—

“Secured by mortgage * * * on real property owned by a person in military service, and still owned by him.”

See the opinion of Mr. Justice Cooley in—*Whiting v. Butler*, 29 *Michigan*, 128, especially page 129. Also *Bunn v. Brasswell*, 515 *S. E.* 930.

The mortgage sale gave to the mortgagees, purchasers, petitioners, at the sale merely an equitable title with the legal title remaining in respondent with the right to use, income, and profits from the property.

We here quote appropriate language from *Mullett v. Mullen*, 49 *Atl.*, 874 (*Maine*):

“The ‘right to redeem the same’ from the purchaser was extended to both. This was not a mere right to purchase, giving no present title. It was expressly a ‘right to redeem.’ That phrase, in law, implies more than a right to acquire. It implies a right to disencumber (to liberate) from a lien or claim. *Cent. Dict.*”

So that it will be noted that the Michigan Supreme court had jurisdiction under the proven facts in this case as a court of equity, to enter the decree filed, independent of the equitable jurisdiction expressly conferred upon all courts by the Relief Act, particularly:

“If it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred, and that by reason of such service, the ability of such person to pay or perform was thereby materially impaired.”

It appears clearly from the testimony that the doctor respondent left his wife and child to receive aid from relatives and gave up a flourishing practice to enter the Military Service, with accruing liabilities for life insurance alone of between fifteen hundred (\$1500.00) and two thousand (\$2000.00) dollars, per year, and that when he returned from the service, he was heavily in debt, and that also he was unable to immediately obtain an office (Poston R., 66).

We take it for granted that where a court has equitable jurisdiction, the determination as to whether or not the facts sufficiently appeal to the court's conscience to grant relief will not be reviewed or interfered with by this appellate court.

Equitable jurisdiction is conferred by the Relief Act where:

“By reason of such service, the ability of such person to pay or perform was thereby materially impaired,”

or—

“Unless in the opinion of the court the ability of the respondent to comply with the terms of

the obligation is not materially affected by reason of his military service."

As was said by the trial court in its opinion (R., 114):

"Undoubtedly the legislation in question is a valid exercise of power on the part of Congress for the commendable purpose of relieving the mind of the soldier from the worries of civil life and enabling him to devote his entire energies to the military needs, *and it is therefore apparent that a suspension of the running of a statutory period for redemption from a foreclosure would subserve such a purpose.*"

As the Relief Act itself puts it:

"In order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the nation."

* * * * *

Counsel for petitioners have fallen into the error of insisting upon a strict construction of the Relief Act.

In determining the applicability of the Federal law to the facts disclosed by the testimony, ordinarily the rule would be that a statute in derogation of the common law, contract provisions, or other statutes, must be strictly construed so that unless it plainly expresses itself to the contrary, it does not conflict with existing statutes, common law, contract provisions, etc.

But opposed to this ordinary rule of construction is the rule that a Federal law, like the one involved in this case, which is a remedial one, intended to protect the special wards of the Government and afford them every

privilege, right, benefit, immunity, and relief possible, must be **LIBERALLY** construed so as to effectuate its before-mentioned remedial purposes.

Kuehn v. Neugebauer, 216 S. W., 261 (Texas).
Halle v. Cavanaugh, 111 Atl. 78, (N. H.).

See also:

Ozawa v. United States, U. S. Sup. Ct. Nov. 1922, *Adv. Sheets*.
People v. Michigan Central Railroad, 145 Mich., 164, 165 and 166.
Hatch v. Calhoun Circuit Judge, 127 Mich., 174;
Endlich, Interpretation of Statutes; *Lewis Sutherland, Statutory Construction*, (2nd. Ed.).

The congressional proceedings showing the debates in Congress on the Relief Act preliminary to its passage, indicate very clearly that the proponents of the Bill anticipated that they could not and did not foresee and provide for every possible instance in which they desired protection to be afforded under the Relief Act. It was because of this fact that they provided a broad general equitable jurisdiction so that where an equitable case could not be brought within the provisions of the wording of the specific rules, protection could, none the less, be given by reason of the power of the court in appropriate circumstances within its discretion under the broad general equitable provisions specially inserted in the act for the purpose.

To recapitulate—

The Writ of Certiorari should not issue because:

1. This court is guided *by the decree* of the Michigan Supreme Court (and not by its opinion), and that decree is warranted by Michigan law.

(a) As a matter of equity and the power of the court to relieve under circumstances of fraud, accident and mistake of law or fact.

(b) Because the same facts of hardship by impairment of ability to meet the obligation by reason of military service for which the Relief Act gives special jurisdiction is a jurisdiction which the Michigan court had *independent* of the Federal statute under its own decisions.

(c) Because of recognition of the mortgage as a continuing obligation (Ex. 11, R. 126) and the estoppel against petitioners to claim expiration of equity of redemption as found by trial court and affirmed by Michigan Supreme Court.

(d) Because if the Michigan Supreme Court exercised equitable jurisdiction under the Federal statute (rather than by its interpretation of extension of statute of limitations time for redemption), this court will not interfere with the lower court's opinion of equities of parties so long as the lower court had jurisdiction.

(e) Because the amount involved and academic interest make it inadvisable to review.

(f) Because right to review is not absolute and petitioners are so immured in fraud and conspiracy that

this court of equity and conscience will not aid them to the extent of review.

("He who comes into a Court of Equity must come with clean hands.")

This case is academic in its value as a precedent for future guidance inasmuch as the time elapsed since the conclusion of the World War makes it improbable that any cases of a like nature can arise under the Relief Act.

Under the circumstances of this case as hereinbefore set forth, and the law applicable thereto, and because of the fact that the amount involved in this case as attempted to be brought before this court, is slightly less than Two Thousand (\$2,000.00) Dollars (the amount fixed by the Michigan Supreme Court to redeem from the mortgage in question), we believe that the application for a Writ of Certiorari should be denied.

Respectfully submitted,

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Penobscot Building,
Detroit, Michigan.



BRIEF FOR RESPONDENT

CORRECTIONS AND ADDITIONS TO PETITIONERS' STATEMENT OF FACTS

The petitioners (mortgagees) became the purchasers of respondent's property at the mortgage foreclosure sale, paying therefor the amount due on the mortgage, (averaging \$219.68 per lot), while from the testimony of Mr. David T. Lorimer (Mich. Rec. 75-a; this U. S. Rec. 41a) fourteen years manager of the Real Estate Department of Detroit Trust Company, the lots at the time of sale were worth from \$550.00 to \$600.00 each, and another real estate operator (Mich. Rec. 76-b; this U. S. Rec. 42-a) testified they were worth from \$700.00 to \$725.00 each.

A deed was given by the sheriff in pursuance of this sale held under the "Power of Sale" clause in the mortgage upon which, under the statute the sheriff "shall endorse upon each deed the time when the same will become operative in case the premises are not redeemed according to law" and under which such deed must "be deposited with the Register of Deeds of the county in which the land therein described is situated * * *." In case such premises shall be redeemed, the Register of Deeds shall AT THE TIME OF DESTROYING SUCH DEED, as provided in Section 12 of this Chapter, WRITE ON THE FACE OF SUCH RECORD THE WORD 'REDEEMED' STATING THE DATE SUCH ENTRY IS MADE, AND SIGN-

ING SUCH ENTRY WITH HIS OFFICIAL SIGNATURE" (Pet. Brief p. 22).

(Pet. Brief, p. 23):

"(14958) Sec. 10. Unless the premises described in such deed will be redeemed within the time limited for such redemption as hereinafter provided, SUCH DEED SHALL THEREUPON BECOME OPERATIVE and shall vest in the grantee therein named, his heirs, or assigns, all the right, title or interest, which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and cancelled as hereafter provided."

Section 14959 following Section 14958, found on pages 22 and 23 of Petitioner's Brief then proceeds to provide that

"If the mortgagor, his heirs, executors, administrators or any person lawfully claiming from or under him or them, shall WITHIN ONE YEAR FROM THE TIME OF SUCH SALE REDEEM THE ENTIRE PREMISES SOLD, * * * and in case such payment is made to the Register of Deeds, the sum of \$1.00 as a fee for the care and custody of such redemption money, *then such deed shall be void and of no effect.*"

The sheriff's deed was recorded on February 7th, 1918, and would have become operative on February 7th, 1919, except that on April 6th, 1917, the United States entered the World War; on March 8th, 1918, United States Congress passed the Soldiers' and Sailors' Civil Relief Act, so-called; on September 24th, 1918, plaintiff entered the military service, from which he was discharged on May 14th, 1919 (Mich. Rec. 121-b, Exhibit 3; this U. S. Rec. 66).

So that, if the mortgage foreclosure sale was valid, when the plaintiff entered the military service the statutory equity of redemption had four months and fourteen days to run before its expiration; and if the sale were valid, and if plaintiff's entrance into military service had not stopped the running of the period for redemption, then when plaintiff was discharged from the military service on May 14, 1919, his right to redemption had expired three months and seven days previous thereto, and the property became forfeited to the defendants.

Plaintiff alleges in paragraph 9 of the bill of complaint (Mich. Rec. 5-b, 6-a; this U. S. Rec. 4-b), and supported by his testimony (Mich. Rec. 61-a; this U. S. Rec. 33-b); that at the time the United States entered the World War, he had a \$3,000.00 indebtedness, exclusive of the mortgage indebtedness, and had life insurance premium obligations amounting to \$2,000.00 annually on policies which had been in existence for 10 to 12 years, on which he had borrowed money previous to entering the military service (Mich. Rec. 61-a; this U. S. Rec. 33-b; Mich. Rec. 66-b; this U. S. Rec. 36-a).

Plaintiff alleges that due to his military service, his health had broken down (Mich. Rec. 9-b, 10-a and 56-b; this U. S. Rec. 6-b, 7-a and 30-31) and when he returned from military service, he was in worse financial position than when he had entered it, and because of conditions in the City of Detroit he was unable to secure an office (Mich. Rec. 61-b; this U. S. Rec. 33-b, 34-a); and that upon his return to Detroit in the latter part of July, 1919, he and Mr. Warren went to see petitioner Ebert with reference to plaintiff's lots and that it was

at this time that plaintiff's right to redeem was recognized and conceded by petitioners and negotiations begun by them to purchase the property from respondent (Mich. Rec. 10-b; 11-a; Keary 45-b; 56-b; 57, 58, 59, 60; 126 Ex. 11; 44-b; 45, 51-b; 52-a; this U. S. Rec. 6-a; 7-b; Keary 24-b; 31-a; 32-33; 6-a, Exhibit 11; 24-a; 25; 28).

In reliance upon these negotiations, in good faith, and when an agreed price at which petitioners would buy the lots was found to be impossible, respondent borrowed \$1500.00 from Dr. George N. Renaud and made tender of Exhibit 5, a certified check in the sum of \$1735.93, the amount fixed by petitioners as necessary to redeem (Mich. Rec. 58-b; 59; this U. S. Rec. 32-b, 33). Before the refusal of this tender, no questions had ever been raised by either Ebert or Keary as to respondent's right to redeem (Mich. Rec. 68; this U. S. Rec. 37).

This was a legal right apparently believed in and recognized by all of the parties, both petitioners and respondent, and their attorneys and even recognized by the *nisi prius* Judge Webster, after argument and re-argument of the cause and the submission of initial briefs but before the submission of the final briefs. Opinion of Court (Mich. Rec. 114-b; this U. S. Rec. 62-63.)

Judge Webster's opinion is that if this had been the correct construction of the Act, *defendant's negotiations with plaintiff for their purchase from him of the lots in question, constituted an estoppel*. Opinion of Court (Mich. Rec. 113-a; this U. S. Rec. 62), affirmed by the Michigan Supreme Court in its opinion.

The fact that these negotiations for the purchase by the petitioners of respondent, of the lots in question, continued until on or about November 20th, 1919, the

date of the tender of the certified check, Exhibit 5, in the amount of \$1735.93, the exact amount named by defendants as acceptable to them to redeem under the mortgage (Mich. Rec. 59-b; this U. S. Rec. 32-b) under the findings of fact of Judge Webster's opinion (Mich. Rec. 113-a; this U. S. Rec. 62), affirmed by the Michigan Supreme Court.

Petitioner Ebert claims to have purchased the lots in question from petitioner Keary on December 18th, 1919. This statement is supported throughout by the testimony of Ebert and Keary, which testimony is unquestionably false and stamps the whole situation with conspiracy of defendants for reasons now stated.

The warranty deed from the Kearys to Ebert (Defendants' Ex. B, this U. S. Rec. 74) purports to have been signed on December 18th, 1919, in the presence of Louis L. Ebert, brother of Edmund L. Ebert, and in the presence of Norman H. Choate, the said Choate being the same party who is associated with Ebert and who purchased the lots in the mortgage foreclosure sale from the Kearys. This is the same Norman H. Choate who as the notary public purported to have taken the acknowledgment of the deed on December 18th, 1919, and states: "My commission expires March 29th, 1924."

The records of the Michigan Secretary of State's office, of which this Court takes judicial notice, show that on December, 1918, Choate's notary commission would have expired on April 12th, 1920, upon his commission dated April 13th, 1916. He was again commissioned as a notary public on March 30th, 1920, expiring March 29th, 1924. This deed was recorded April 26th, 1920. Evidently this deed was dated back because notice of plaintiff's rights in this property was recorded in the

office of the Wayne County Register of Deeds in December, 1918 (Mich. Rec. 124, 125, Exhibits 7 and 8; 65-b; this U. S. Rec. 67, 68, Exhibits 7 and 8; 36). The deed was executed certainly subsequent to March 30th, 1920, the date when the governor of the State under the law commissioned Choate as notary public with the commission expiring March 29th, 1924 (as certified to in the deed) and certainly Choate did not know four months previous to the execution of the deed that thereafter he was to be commissioned a notary public so as to put the expiration of that commission on the deed. Respondent's position is as follows:

1. In the words of petitioners' brief (p. 4):

"The opinion of the Michigan Supreme Court rests upon the theory that the right or privilege given by the Michigan statute to redeem from such a mortgage foreclosure sale within one year of the sale, is a civil right or limitation (within the meaning of Sections 1-205, and 603 of the Soldiers' and Sailors' Civil Relief Law) and that, while not expressly referred to in the 'Soldiers' and Sailors' Civil Relief Act,' this civil right or limitation is within the spirit, if not within the letter of that statute, and that the period of military service under Section 205 of the Federal Act must be added to the period of redemption fixed by Michigan statute law."

2. The following propositions were raised in respondent's brief before the Michigan Supreme Court but no decision made thereon by the Michigan Supreme Court and we respectfully submit to this Court that this Court should either affirm the Michigan Supreme Court because of the correctness of its decision for the reason given by it, or else affirm the decision by reason of the accuracy of respondent's claim of rights raised before the Michigan

Supreme Court and not passed upon by it and now presented to this court for determination with the other issue, namely:

(a) Because of the equitable jurisdiction conferred by the Relief Act within the statement of facts, where

“By reason of such service the ability of such person to pay or perform was thereby materially impaired,”

or

“Unless in the opinion of the court the ability of the respondent to comply with the terms of the obligation is not materially affected by reason of his military service.”

As the Relief Act puts it:

“In order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their energy to the military needs of the nation.”

(b) Because the Michigan Supreme Court was authorized to make the decree that it did, (Chancery matters in Michigan being heard *de novo* on appeal) and this court should come to the same conclusion, *under the general equitable jurisdiction of the Michigan Supreme Court as a matter of law*, (independent of and in addition to the equitable jurisdiction of the Michigan Supreme Court under the Soldiers' and Sailors' Relief Act), by virtue of the testimony in the record showing plaintiff's equities and defendants' iniquities.

Millard v. Truac, 50 Mich. 343.

McIntyre v. Wyckoff, 119 Mich. 557.

Brown v. Burney, 129 Mich. 204.

Williams v. Bolt, 170 Mich. 517.

Dalton v. Weber, 203 Mich. 453.

Hunt v. Rousmanier's, 8 Wheat 174, (U. S. Supreme Court), 5 L. Ed., 589, 600.
Schroeder v. Young, 161 U. S. 334.

(c) *If this court is unwilling to pass upon this case upon the equities and the equitable jurisdiction conferred by the Relief Act and upon the equitable jurisdiction under these same facts inherent in the Michigan Supreme Court independent of the Relief Act by virtue of the foregoing cited decisions, and if this court cannot agree with the Michigan Supreme Court's opinion construing the Relief Act, on this certiorari this court should refer the matter back to the Michigan Supreme Court for a determination of these two issues which the Michigan Supreme Court failed to pass upon.*

That these questions were raised before the Michigan Supreme Court is clearly apparent from page 10 of our brief before that court which is as follows:

"The following propositions of law are contended for by plaintiff:

I

There was no proof of a legal mortgage foreclosure by the defendants.

II

If the mortgage foreclosure sale was legal, the rights of plaintiff as of the date of his entry into military service on September 24th, 1918, were preserved to him by the provisions of the Soldiers' and Sailors' Civil Relief Act, so-called.

(a) Because of the provisions of Section 205 staying the running of the period for redemption.

(b) Because of Section 202 in that divesting plaintiff of his legal title by permitting the expiration of the redemption period while he was in military service would be 'a penalty incurred while plaintiff was in the military service and his ability to pay was thereby materially impaired.'

(c) Because of Section 301 preventing defendants from terminating the contract or resuming possession of the property for non-payment, 'during the period of such military service except by action in a court of competent jurisdiction.'

(d) Because of the provisions of Section 302, (2) read together with Section 301 (1), which by reason of defendants' failure to comply therewith, prevented a court from exercising the equitable jurisdiction conferred by Section 302 (2) (a) (b).

(e) Because Section 100 and 603 of the Soldiers' and Sailors' Civil Relief Act, read together with the provisions hereinbefore referred to, make it conclusively appear that the 'transaction' in question in this case, under a proper construction of the Act, comes within the protection of the Soldiers and Sailors Civil Relief Act.

III

(a) Because this Michigan Court of Equity, under the established facts in this case, and under the Michigan decisions applying thereto, as well as under the special equitable jurisdiction conferred by the Soldiers and Sailors Civil Relief Act, has the power and should exercise it to give relief.

(b) Because the conduct of the defendants in negotiating for purchase by them from plaintiff of the property in question, constitutes a recognition of the mortgage as a continuing mortgage; a waiver of the foreclosure and an estoppel to set up the foreclosure."

ARGUMENT

I.

As to subdivision No. 1, we are satisfied with the opinion of the Michigan Supreme Court hereby expressly made a part of this brief, which amply covers the subject.

II.

Bearing in mind that while ordinarily the rule would be that a statute in derogation of the common law, contract provisions, or other statutes must be strictly construed unless it plainly expresses itself to the contrary so that it does not conflict with existing statutes, common law, contract provisions, etc., opposed to this ordinary rule, *of construction is the rule that a Federal law, like the one that is involved in this case, which is a remedial one, intended to protect the special wards of the Government and afford them every privilege, right, benefit, immunity and relief possible, must be LIBERALLY construed so as to effectuate its before-mentioned remedial purposes.*

Kuehn v. Neugebauer, 216 S. W. 261 (Texas).

Halle v. Cavanaugh, 111 Atl., 78 (N. H.)

People v. Michigan Central Railroad, 145 Mich. 164, 165 and 166.

Hatch v. Calhoun Circuit Judge, 127 Mich. 174.

Endlich, Interpretation of Statutes.

Lewis Sutherland, Statutory Construction (2nd Ed.).

II (a)

The statement of facts amply covers the equities of the case without necessity for amplification here.

II (b)

We are not interested in the decisions of other courts quoted in petitioners' brief with reference to mortgage foreclosure sales, because this case is governed by the peculiar and particular form of statute in Michigan with reference to mortgage sales and the declarations with reference to the laws applicable thereto under our Michigan statutes by our Michigan Supreme Court, as hereafter quoted.

With reference to the language of Section 302, as to obligations originating prior to the Act and secured by mortgage, etc., "or other security in the nature of a mortgage upon real or personal property *owned* by a person in military service at the commencement of military service *and still so owned by him,*" it must be borne in mind that our Michigan statute provides that neither the sale nor deed become *operative* until one year after the sale (and upon redemption the undelivered deed left with register is void) and then only unless the mortgagee fails to redeem; and until that time the mortgagor has and is entitled to the legal title to the property including occupancy, rents and profits, etc. We here quote appropriate language from

Whiting v. Butler, 29 Mich. 128,

the opinion of the court being by Justice Cooley:

"But is it true that Theodore J. Campau, at the time sale was made on the second execution, had in the premises a mere right to redeem? Most certainly he had something which was very much beyond and above any such mere right. He had the legal title. As owner he might sell and convey the land and deliver possession, might mortgage and lease, might receive the rents and profits, might defend his possession by legal proceedings, or even by force, and if an intruder had obtained possession, might have ejected him by all the same remedies which would have been admissible had his title been subject to no contingency or condition."

Page 129:

"* * * Moreover, if we examine our statutes we shall find that a mere right to redeem has never been subject of an execution sale in this state. It is true that interests which were liable to be defeated by a failure to redeem have been salable, but in every instance these have been legal titles. *What we call the equity of redemption in mortgaged lands is subject to levy and sale, but this is for the very reason that we recognize the owner of that equity as legal owner of the land, and the term 'equity of redemption' as applied to his interest, is well understood to be now, whatever it may have been formerly, a misnomer. Had he a mere equity or right to redeem, it would not be the mortgagor, but the mortgagee, who would be considered owner of the land, and as owner it would be the interest of the mortgagee which could be sold on execution. This, however, has never been allowed in this state. And though other parties have had rights to redeem, distinct from any ownership of a legal title—such as second or other subsequent*

mortgagees, judgment creditors with levies, mechanics with liens, etc.—*it would require an express statute to subject these rights to attachment and sale on legal process, and a very great change in our practice and notions on such subjects before such a statute would be likely to be adopted.*”

In other words, it clearly appears that the mortgagor's title to his property has in no whit changed by the mortgage foreclosure sale, except that a time is fixed when it will change.

It is idle to urge upon the Court that neither Section 202 nor Section 205 apply, in words or terms, exactly to the situation at bar. Such argument is for a strict construction of this remedial act. It is more appropriate to urge upon the Court the purpose of the act as set forth in Section 100:

“to extend protection to persons in military service
 * * * to prevent prejudice or injury to their
 civil rights during their term of service and to
 enable them to devote their entire energy to the
 military needs of the nation, and to this end the
 following provisions are made for the temporary
 SUSPENSION OF * * * TRANSACTIONS
 which may prejudice the civil rights of persons in
 such service during the continuance of the present
 war.”

Is it not perfectly clear upon this record that if Dr. Poston had not been given legal advice by Judge Bartlett that his transaction with the defendants was protected by the Act, his mind would have been so perturbed by worry as to possible forfeiture of his property, endeavors to raise the money to redeem, efforts to secure furloughs so as to return to Detroit and make

financial arrangements, etc., that it would have been absolutely impossible for him "to devote his entire energy to the military needs of the nation" with his mind thus engrossed and occupied?

That the parties still considered this mortgage in effect and in existence and not canceled or ended by the sale under the present claim of petitioners that the year for redemption expired on February 7th, 1919, is evident from Exhibit 11, dated July 24th, 1919, signed by the petitioner Keary and reading as follows:

"Dear Sir:

Below please find figures showing *amount due on lots 32, 35, 37, 39, 41, 43, 45 and 47, Sunnyside Subdivision, Mortgaged Sept. 25-16, by Eddie E. Hulett and wife.*

Interest is computed to Aug. 5, 1919, BUT REDUCTION CAN BE MADE SHOULD PAYMENT BE MADE BEFORE THAT DATE.

Yours truly,

(Signed) A. J. Keary.

Due Aug. 5, 1919.....\$1,945.39"

The findings of the *nisi prius* Judge, affirmed by the Michigan Supreme Court, are that this estopped petitioners to refuse the subsequent tender while the negotiations for settlement were still in progress except for the holding this offer was not binding as being without consideration, the time for redemption having previously expired, which finding was reversed by the Michigan Supreme Court opinion.

In *Williams v. Bolt*, 170 Mich. 517, the claim was made that the defendant, having received a deed subsequent to the expiration of the redemption period, he was the owner of the property. The Supreme Court

disposed of this claim by saying that that contention was inconsistent with the defendant subsequent to having received this deed and on June 17th, 1905, having sent plaintiff the following statement:

“Statement. Muskegon, Michigan, June 17th, 1905. Mr. O. T. Bolt to John Williams, Dr. (That is the way it reads.) Principal \$1,162.50; interest, \$208.32; taxes, \$417.35; Lovelace, \$211.83.”

The Supreme Court after referring to defendant's claim that the original \$1400.00 was never repaid to him and that the first deed was security for it, says:

“He does claim, however, that at the time of obtaining the Woolner deed, the redemption period having expired, the title of complainant and the claim of said defendant had both become extinguished by the sheriff's deed to the Woolners after the expiration of the redemption period, and that from the time he obtained the deed from the Woolners he became the owner of this property * * *.”

“It is the claim of complainant that, applying the rule ‘once a mortgage, always a mortgage,’ the defendant could not in the manner indicated acquire the title as against him.” * * *

“We think that it can be said that at the time of making this statement defendant Bolt recognized the relation of mortgagor and mortgagee.”

In:

Brown v. Burney, 128 Mich. 204,

a bill was filed AFTER THE EXPIRATION OF THE TIME FOR REDEMPTION to set aside a statutory mortgage foreclosure on the ground that it was defective. It was not a bill to redeem, it contained no

specific prayer for that relief, and made no offer to pay the mortgage debt. The Supreme Court considered it a bill to redeem, and decreed redemption, under the circumstances, *although they found the foreclosure valid and undefective.*

The Supreme Court held the mortgage foreclosure good and reversed the Circuit Court holding that the mortgage foreclosure was not defective but gave relief, nevertheless, *from a pure mistake of law on the part only of the party seeking relief after expiration of redemption period.*

The case of *Benson v. Bunting*, (59 Pac., 991 Calif.), was another case where redemption was allowed *after the expiration of the statutory period because of a pure mistake of law.*

In support of this decree, the Supreme Court of California quotes from the opinion of Chief Justice Marshall of the United States Supreme Court in the case of

Hunt v. Rousmanier's, 8 Wheat 174, 215, 5 L. Ed. 589, 600:

“Although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity.”

See also *Schroeder v. Young*, 161 U. S., 334.

Mr. Justice Brown, for the United States Supreme Court:

“There is a concurrent jurisdiction of a court of equity, founded upon the general right to re-

lieve from the consequences of fraud, ACCIDENT OR MISTAKE, NOTWITHSTANDING THE STATUTORY PERIOD FOR REDEMPTION HAS EXPIRED."

Also see *Millard v. Truar*, 50 Mich., 343; *McIntyre v. Wyckoff*, 119 Mich., 557; *Dalton v. Weber*, 203 Mich., 453.

In *Millard v. Truar*, *supra*, Mr. Justice Cooley, for the court, held that though the defendant had absolute title by reason of the first mortgage foreclosure (defendant being the purchaser at first mortgage sale) on his foreclosing the second mortgage which he also held, and then accepting a tender of redemption money on the second mortgage foreclosure although claiming absolute title to the land, the MORTGAGOR'S ASSIGNEE WAS ALLOWED TO MAINTAIN A BILL TO REDEEM FROM THE FIRST FORECLOSURE, ALTHOUGH THE REDEMPTION HAD EXPIRED, on the ground that by accepting the redemption money on the second mortgage foreclosure, the *defendant was estopped from SETTING UP HIS ABSOLUTE TITLE* as being inconsistent with acceptance of redemption money.

In *McIntyre v. Wyckoff*, *supra*, the second mortgage foreclosure by advertisement HAD BECOME ABSOLUTE before the filing of the bill. ON GENERAL EQUITABLE PRINCIPLES, *although holding the sale valid, and although the statutory period for redemption had expired before the bill was filed*, the court nevertheless allowed 20 days within which to redeem, and after affirmance of the decree by the Supreme Court on complainant's appeal, the Supreme

Court allowed 20 days from its decree within which to redeem.

In *Dalton v. Weber*, *supra*, after the second mortgage foreclosure had become absolute, the mortgagors, on the General Equitable jurisdiction of the court, NOTWITHSTANDING THE EXPIRATION OF THE STATUTORY PERIOD FOR REDEMPTION, were allowed to file a bill and permitted to redeem, on the mere showing that the mortgage was usurious.

We take it this follows the statement of the rule by Justice Montgomery in

People v. M. C. R. R., 145 Mich., 145.

"Courts of equity are not within the words of the statute of limitations," citing

1 Story on Equity Jurisprudence, Sec. 529.

Jenny v. Perkins, 17 Mich., 28.

Smith v. Blindbury, 66 Mich., 325.

Allen v. Conklin, 112 Mich., 74, 77, 78.

From the last cited case the following from

Tompkins v. Hollister, 60 Mich., 470, is cited,

"Courts of equity not only act in obedience and in analogy to the statutes of limitations in proper cases, but they also interfere, in many cases, to prevent the bar of the statutes where it would be inequitable or unjust. *A fortiori*, they will not allow such a bar to prevail, by mere analogy, to suits in equity, where it would be in furtherance of a manifest injustice."

2 Story, Eq. Jur. Sec. 1521, 13 Am. & Eng. Enc. of Law, 680.

Thus we find the Michigan Supreme Court refusing to accept as absolute, arbitrary, unyielding, and binding the statute of limitations by which the Michigan legislature has sought to fix, absolutely, one year from mortgage foreclosure sale as the end of the period of redemption as being an infringement upon the equitable jurisdiction and powers of the court, and of the legislative upon the judicial branch of the government.

Respondent entered the army September 24th, 1918. The statutory equity of redemption would have expired February 7th, 1919, four months and fourteen days later. Add this four months and fourteen days to May 14th, 1919, the date of respondent's discharge from military service, brings the date of expiration of the statutory equity of redemption to September 28th, 1919. Does this account for respondent Keary's Exhibit 11, dated July 24th? Does this account for respondent Ebert's prolonging the negotiations for purchase by the petitioners of the property from respondent from July to November 20th (as found by the Circuit Judge) (Opinion of the Court, Mich. Rec. 113-a; this U. S. Rec. 62) so as to bar this equity by lapse of time, as he believed that it existed? We have a right to infer that when on November 19th, 1919, petitioner Ebert fixed the amount which he would accept from respondent to redeem (Mich. Rec. 58; this U. S. Rec. 31-a, 32-b), he did it believing that the doctor did not have the funds and could not raise the funds with which to redeem. Then when he found that the doctor did have the money and tendered the check (Mich. Rec. 59; this U. S. Rec. 32), Exhibit 5, he dilly-dallied along and made other excuses for not accepting the tender (Mich. Rec. 59-b; this U. S. Rec. 32).

Ebert testifies (Mich. Rec. 93; this U. S. Rec. 51) that he bought the lots from *Keary the day the deed was dated, December 18th, 1919, and that he paid \$2600.00 cash therefor (Exhibit G. R. 146). The notary public certifies in the acknowledgment of the deed (Exhibit G) that it was acknowledged before him on December 18th, 1919, and then certifies that his notary commission expires March 29th, 1924. The records of the Secretary of State's office show that he was not commissioned as a notary public, with a commission expiring March 29th, 1924, until March 30th, 1920, so that it is clearly evident that the deed in question could not have been executed by the parties until some time subsequent to March 30th, 1920, as it is clear that on December 18th, 1919, a notary public could not know that three and one-half months later, on March 30th, 1920, he was going to become a notary. There is no mistake here.*

The congressional proceedings reporting the debates in Congress on the Relief Act preliminary to its passage, indicate very clearly that the proponents of the bill anticipated that they could not and did not foresee and provide for every possible instance in which they desired protection to be afforded under the Relief Act. (Soldiers' and Sailors' Civil Rights Bill; hearings before the Subcommittee of the Committee on the Judiciary United States Senate 65th Congress First Session on S. 2859, part 1, printed for the use of the Committee on Judiciary; September 22, 1917; (Sec. Baker, p. 1, 7 (where *Stewart v. Kahn*, 11 Wall 493 relied on in Michigan Supreme Court opinion is referred to) 9, 10; Wigmore, 14, 15, 16, 17, 21, 26; Soldiers' and Sailors' Civil Rights Bill, hearings before the Subcommittee of the Committee on the Judiciary United States Senate

65th Congress First Session on S. 2859, Part 2, September 25th, 1917; Soldiers' and Sailors' Civil Rights Bill Memorandum before the Subcommittee of the Committee on the Judiciary United States Senate 65th Congress First Session on S. 2859, September 14th, 1917, (Wigmore, 26 and 27, 28, 30, 31, 34, 39, 41, 42, 54, 71, 72.) It was because of this fact that they provided a broad general equitable jurisdiction so that where an equitable case could not be brought within the provisions of the wording of the specific rules, protection could, none the less, be given by reason of the power of the court in appropriate circumstances within its discretion under the broad general equitable provisions specially inserted in the act for the purpose.

In this case we are prepared to say as to mortgages in the language in petitioners' brief on page 9 quoting the court's language in *Ethridge v. Sperry*, 139 U. S. 266, 277.

"They are instruments for the transfer of property, and the rules concerning the transfer of property are primarily, at least, *a matter of state regulation*. We are aware that there is great diversity in the rulings on this question by the courts of the several states; *but whatever may be our individual views as to what the law ought to be in respect thereto*, there is so much of a local nature entering into chattel mortgages that *this court will accept the settled law of each state as decisive in respect to any sale arising therein.*" And see *Whiting v. Butler* (Mich.), *supra*.

Respectfully submitted,

LOUIS COHANE,

Attorney for Respondent.

Dated at Detroit, Mich., December 2, 1924.

EBERT ET AL. v. POSTON.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF
MICHIGAN.

No. 153. Argued December 12, 1924.—Decided January 12, 1925.

1. Subsections 2 and 3 of § 302 of the Soldiers' and Sailors' Civil Relief Act of March 8, 1918, as amended September 3, 1919, which provide for stays of proceedings to foreclose mortgages whether in court or *in pais* under powers of sale, are to be construed with § 101 (2), defining "period of military service," and

do not include proceedings taken prior to the passage of the act or prior to the commencement of the military service of the owner of the mortgaged property. P. 552.

2. Section 205 of this act, which provides "that the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service, . . . whether such cause of action shall have accrued prior to or during the period of such service," does not apply to a statutory right to redeem real estate, after foreclosure through advertisement and sale under a power-of-sale mortgage, by payment of the sum bid with interest and fees without resort to court proceedings. P. 553.
3. The judicial function in construing a statute is limited to ascertaining the intention of the legislature therein expressed. P. 554. 221 Mich. 361, reversed.

CERTIORARI to a decree of the Supreme Court of Michigan which reversed a decree dismissing a bill to redeem land from a foreclosure made by advertisement and sale at public vendue.

Mr. P. J. M. Hally and *Mr. Elmer H. Groefsema*, with whom *Mr. Thos. J. Bresnahan* was on the brief, for petitioners.

Mrs. Regene Freund Cohane and *Mr. Louis Cohane* for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is a writ of certiorari granted, 263 U. S. 694, to review a decree of the Supreme Court of Michigan involving the effect of the Federal Soldiers' and Sailors' Civil Relief Act, March 8, 1918, c. 20, 40 Stat. 440, as amended September 3, 1919, c. 55, 41 Stat. 282, upon a foreclosure of land made under the laws of that State. 221 Mich. 361. There is no controversy concerning any provision

of state law. The question presented is solely one of the construction of the federal act.¹

The statutes of Michigan provide that a mortgage of real estate duly recorded which contains a power of sale may, without resort to any proceedings in court, be foreclosed by advertisement and sale at public vendue. The deed to the purchaser, which is to be promptly deposited with the register of deeds for the county in which the land is situated and appropriately endorsed, vests in the grantee or his assigns all the right, title and interest of the mortgagor, upon the mere lapse, without redemption, of one year from the date of the sale. The statutes provide for redemption at any time within the year, also without resort to any proceedings in court, by paying to the purchaser, or the register, the sum which was bid for the property with prescribed interest and fees. If this is done, the deed becomes void; the register destroys it; and an appropriate entry is made in the registry to clear the title. *Compiled Laws of Michigan, 1915, c. 249.*

In 1920, Poston brought this suit in a court of the State to redeem a parcel of land from a foreclosure made by advertisement and sale at public vendue pursuant to the statutes. The purchasers at the sale and a grantee under them, the petitioners here, were joined as defendants. The mortgage, given in 1916, had been assumed by Poston when he purchased the land in 1917. The foreclosure sale was duly made on February 5, 1918. There was no redemption within the year. After February 5, 1919, the deed, which had been deposited with the register, was delivered by him to the purchasers. The right of redemption, despite the lapse of the statutory period of one year,

¹In a motion for rehearing filed in the state Supreme Court constitutional questions were discussed. That court, in denying the petition, refused, under its settled practice, to consider them, because they had not been urged in the original brief. They are not urged here.

was asserted under the Federal Civil Relief Act. That Act was passed about a month after the sale. Poston enlisted in the army, on September 29, 1918—nearly eight months after the sale. He was discharged on May 14, 1919—more than three months after the expiration of one year from the date of sale. On July 24, 1919—that is, nearly eighteen months after the date of the foreclosure sale—negotiations were begun by Poston which later ripened into a tender. Under the law of Michigan, these negotiations followed by the tender constituted a sufficient basis for the bill to redeem, provided the period of redemption given by the statute had not then expired. The trial court dismissed the bill. On appeal, the Supreme Court of the State held that, by reason of the federal Act, the one-year period for redemption had been extended by the length of the period of military service, and that, consequently, the extended period had not yet expired on July 24, 1919. Whether the federal Act was correctly construed is the question for decision.

The court below recognized that the Act does not in terms cover the case of a sale by advertisement made before the passage of the Act. Its conclusion that the federal Act extended the statutory period of redemption rests upon the following reasoning. Under the laws of Michigan, the mortgagees might have brought proceedings in chancery to foreclose the mortgage, Compiled Laws, 1915, § § 12676-12692, instead of proceeding by advertisement. If they had sued in chancery, that court would, by reason of the federal Act, have possessed the power to stay execution of its own decree after a sale made thereunder, provided application was made to it before expiration of the time therein fixed for redemption. Therefore the Act should be construed so as to accomplish a like result in the case of a foreclosure by advertisement. The provisions in the Act which are relied upon in support of this conclusion are § 302 and § 205. The former (set forth in

the margin²) is the only section which mentions mortgages or powers of sale. The latter (also set forth in the margin²) relates to the statutes of limitation of actions. We are of opinion that neither section supports the conclusion, and that it is erroneous.

Subsection 2 of § 302 deals with proceedings brought in court to foreclose mortgages. Subsection 3 deals with sales under powers of sale, whether brought in court or effected *in pais*, as by advertisement. Neither subsection includes within its scope proceedings taken prior to the

²Sec. 302. (1) That the provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

(a) Stay the proceedings as provided in this Act; or

(b) Make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court.

³Sec. 205. That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service.

passage of the Act or prior to the commencement of the military service. By their own words, subsection 2 applies to suits commenced "during the period of military service," and subsection 3 to sales made "during the period of military service or within three months thereafter." But the definition given in subsection 2 of § 101 to the words "period of military service" makes the words used in § 302 mean that part of the military service which follows "the date of approval of this Act." Thus, a decree for foreclosure may be stayed, or otherwise disposed of, under § 302 only if the suit was commenced after the passage of the Act and during the period of military service. And, likewise, it is only sales made after the passage of the Act and during military service that are invalidated if made without leave of court.

Section 205 does not apply to transactions which are effected without judicial action. The statutory right to redeem from a sale by advertisement is not a right of action. It is a primary right as distinguished from a remedy. The defeasible title of the purchaser at the sale becomes absolute if the mortgagor fails to avail himself of the right within the statutory period. The purchaser's title is extinguished if it is availed of. The bill in equity is merely the remedy by which the right, if still existing, may be enforced.

There is a further contention that the broad purpose of the Act declared in § 100,⁴ demands that it be liberally

⁴Sec. 100. That for the purpose of enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war.

construed to include the situation presented by this case. Persuasive legislative reasons for distinguishing between the cases explicitly cared for by §§ 302, 205, and the present case suggest themselves. We have no occasion to state them. The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation. Compare *United States v. Weitzel*, 246 U. S. 533, 543. This Act is so carefully drawn as to leave little room for conjecture. It deals with a single subject and does so comprehensively, systematically, and in detail. There are in the Act an aggregate of 36 sections and 27 subsections. To ensure certainty, separate provision is made for each of the several classes of transactions to be dealt with and for the situations likely to arise in each. To promote clarity, the Act is divided into six articles, each dealing with a different branch of the subject. The difference in treatment accorded to transactions taking place during a period of military service after the passage of the Act as distinguished from those occurring before, is not limited to mortgages and other secured obligations dealt with in § 302. A like distinction is made in the Act in respect to other classes of transactions.* Such care and particularity in treatment preclude expansion of the Act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions. Without resort to the common rule that statutes are ordinarily to be construed as prospective in operation, *Shwab v. Doyle*, 258 U. S. 529, 534, it is clear that Congress did not intend

* Compare provisions concerning taxes and assessments, § 500; rent, § 300; rights to public lands, § 501; insurance, § 405; installment purchases, § 301; defaults in actions, § 200; staying of actions, § 201. In the case of attachment and garnishment, § 203, the provision explicitly includes both proceedings commenced during military service and those commenced before.

to deal with sales on foreclosure made before the passage of the Act.*

We need not consider the contention of the petitioners that the owner of the right of redemption from a sale by advertisement under the Michigan laws is not an owner of real property within the meaning of subsection 1 of § 302 of the federal Act. Nor need we consider the contentions of the respondent that there was no proof of a legal foreclosure and that, independently of the federal Act, he was entitled to redeem. The latter present questions wholly of state law.

Reversed.

OZARK PIPE LINE CORPORATION v. MONIER ET AL.